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ARTICLES

THE LAW OF TYPICALITY: EXAMINING THE PROCEDURAL DUE PROCESS IMPLICATIONS OF *SANDIN V. CONNER*

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Although the Due Process Clause of the Fourteenth Amendment has long protected against deprivations that implicate state-created liberty interests as well as core constitutional concerns, the Supreme Court changed course in liberty interest jurisprudence in *Sandin v. Conner*. It retreated from a positivist approach and articulated a new test for determining when a prisoner's claim warrants procedural due process. The Court held that the challenged action must impose an "atypical and significant" hardship, but provided little guidance on how to measure typicality and significance. This Article proposes a methodology for examining typicality that is grounded in empirical evidence and advocates a balancing test that weighs typicality based on actual state practices, significance as a de minimis threshold, and state positive law as an evidentiary tool in determining whether a liberty interest is at stake. In contrast to the actual approaches taken by the lower courts interpreting *Sandin*, this proposal has the benefit of promoting consistency, integrity, and coherence in the development of the law regarding state-created liberty interests.

INTRODUCTION

Does the scope of a prisoner's constitutional right to due process vary from state to state? Two prisoners in two different states are found guilty on escape charges following prison disciplinary hearings. In both cases, the prisoner had told a guard that if he was not granted a certain housing placement, he would try to escape, and in both cases, the only evidence at the hearing was the prisoner's statement. In the first case, a federal court found a procedural due process violation

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based on the absence of evidence of guilt.[1] In the second, a federal court held that the punishment imposed as a result of the escape conviction, which was more severe than in the first case, was insufficient to trigger procedural due process protections.[2] These different outcomes represent more than individual courts reaching varying decisions. They resulted from significant differences in the courts' methodologies for analyzing due process claims.

Although the Due Process Clause of the Fourteenth Amendment clearly provides protection against certain extreme deprivations of liberty,[3] the contours of state-created liberty interests that also give rise to due process protection are murky at best. The scope of the constitutional prohibition against any state taking of "life, liberty, or property, without due process of law,"[4] depends on the meaning of life, liberty and property, and courts have traditionally used state law to inform and expand the definition of these concepts.[5] This Article proposes a new approach for determining when and how state law and practice should be used in liberty interest analysis in light of the Supreme Court's decision in *Sandin v. Conner*.[6]

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1. Burnsworth v. Gunderson, 179 F.3d 771, 774-75 (9th Cir. 1999); *see also infra* text accompanying notes 235-41.

2. Torres v. Fauver, 292 F.3d 141, 151-52 (3d Cir. 2002); *see also infra* text accompanying notes 196-204.

3. *See, e.g.*, Washington v. Harper, 494 U.S. 210, 221-22 (1990) (recognizing a prisoner's liberty interest in avoiding involuntary injection with anti-psychotic drugs); Vitek v. Jones, 445 U.S. 480, 493-94 (1980) (recognizing a prisoner's liberty interest in avoiding involuntary transfer to a state mental hospital).

4. U.S. Const. amend. XIV, § 1. Although the framework for this Article is based on challenges to state action under the Fourteenth Amendment, my analysis also applies to challenges to federal action under the Fifth Amendment guarantee of due process.

5. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 572-73 (1975) ("Protected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits." (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972))); Wolff v. McDonnell, 418 U.S. 539, 557 (1974) ("[T]he State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.").

6. 515 U.S. 472 (1995). The scholarly commentary on *Sandin* has primarily been in the form of student articles and has generally criticized *Sandin* for limiting prisoners' due process rights too narrowly. *See, e.g.*, Michelle C. Ciszak, Note, Sandin v. Conner: *Locking Out Prisoners' Due Process Claims*, 45 Cath. U. L. Rev. 1101 (1996) (criticizing failure to recognize liberty interest in avoiding solitary confinement and limitation of federal forum for due process claims); John K. Edwards, Note, *A Prisoner's Threshold for Procedural Due Process After* Sandin v. Conner: *Conservative Activism or Legitimate Compromise?*, 33 Hous. L. Rev. 1521 (1997) (asserting that the Court misapplied a workable test and criticizing its failure to focus on the duration and physical conditions of solitary confinement); Christopher D. Meyer, Note, *Objective Expectations, Liberty Interests, and Official Discretion:* Sandin v. Conner *Considered in Light of Colorado Inmates Facing Administrative*

In *Sandin*, the Court's self-described purpose was to return to due process principles described in precedent from the mid-1970s[7] and to retreat from the positivist methodology for analyzing prisoners' due process claims established a decade later in *Hewitt v. Helms*.[8] In doing so, however, *Sandin* raised more questions than it answered, and the lower courts have struggled to craft a coherent and effective approach for determining when a prisoner's claim implicates due process concerns.[9] Ignoring positivism's utility in examining prisoners' due process claims,[10] the *Sandin* Court focused instead on the concept of

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Segregation, 68 U. Colo. L. Rev. 229 (1997) (asserting that placement in administrative segregation harms an inmate's chance of parole and thus results in an "atypical and significant" hardship); *The Supreme Court, 1994 Term – Leading Cases*, 109 Harv. L. Rev. 111, 150 (1995) (predicting that after *Sandin*, "the future does not bode well for the success of prisoners' due process claims"); Philip W. Sbaratta, Note, Sandin v. Conner: *The Supreme Court's Narrowing of Prisoner's Due Process and the Missed Opportunity to Discover True Liberty*, 81 Cornell L. Rev. 744 (1996) (criticizing *Sandin* for narrowing liberty interest jurisprudence too much and advocating use of the *Mathews v. Eldridge* balancing test); Deborah R. Stagner, Note, Sandin v. Conner: *Redefining State Prisoners' Liberty Interest and Due Process Rights*, 74 N.C. L. Rev. 1761 (1996) (providing an overview of due process jurisprudence and advocating vigorous federal court protection of prisoners' due process rights); James E. Robertson, *The Decline of Negative Implication Jurisprudence: Procedural Fairness in Prison Discipline After* Sandin v. Conner, 32 Tulsa L.J. 39 (1996) (asserting that procedural safeguards should be required for deprivations that affect good time credits); *cf.* Barbara Belbot, *Where Can a Prisoner Find a Liberty Interest These Days? The Pains of Imprisonment Escalate*, 42 N.Y.L. Sch. L. Rev. 1, 69 (1998) (criticizing the Court's perspective of "atypical or significant" as based "at best, on an uninformed and naive understanding of prison life, or, at worst, on a mean-spirited attitude that panders to society's less noble instincts"); Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 Or. L. Rev. 1229, 1255-61 (1998) (interpreting *Sandin* as having created a new pleading requirement that may have collapsed due process protection to the Eighth Amendment prohibition against cruel and unusual punishment).

7. *Sandin*, 515 U.S. at 483 (citing Meachum v. Fano, 427 U.S. 215 (1976); *Wolff*, 418 U.S. at 539).

8. 482 U.S. 755 (1987); *see also infra* text accompanying notes 62-73; *Sandin*, 515 U.S. at 483 n.5. Positive law refers to "[l]aw actually and specifically enacted or adopted by proper authority for the government of an organized jural society," Black's Law Dictionary 1162 (6th ed. 1990), such as state statutes and regulations.

9. The Court has generally hewn closely to the two-step analysis developed in *Board of Regents v. Roth*: Has the plaintiff been deprived of liberty or property, and if so was it without due process of law? 408 U.S. 564 (1972). *See generally* Cynthia R. Farina, Conceiving Due Process, 3 Yale J.L. & Feminism 189, 191-96 (1991) (discussing procedural due process doctrine before and after *Roth*). But *Sandin* marks a departure in the way the first step of this familiar methodology is applied.

10. *See* Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. Rev. 482, 487-503 (1984) (describing the emergence of positivism and reliance on state statutes in defining property and liberty interests after *Board of Regents v. Roth*); *cf.* Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 Stan. L. Rev. 69, 75-94 (1982) (tracing the evolution of entitlement doctrine as a specific application of the right-privilege distinction).

"'grievous loss.'"[11] It held that a deprivation does not reach liberty interest status and require procedural due process protection, unless it imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[12] The Court thus forged typicality and significance as two tools for evaluating due process claims, but provided little guidance on their use and left open the question of positivism's role. Courts in most circuits, nevertheless, have continued to use state positive law when analyzing prisoners' due process claims.[13]

My central thesis is that judgments about typicality must be grounded in empirical evidence regarding a state's actual practices. *Sandin* charged federal courts with the task of deciding whether a deprivation is sufficiently "atypical and significant" to warrant procedural due process protections. A determination about typicality by its nature is standardless, however, unless it is anchored in a factual analysis of how prisoners are actually treated. By contrast, since courts routinely make judgments about significance in a variety of contexts,[14] this factor can be applied as a de minimis threshold test without any particular reference to state practice or law. Finally, positivism should remain an important interpretive, as opposed to definitional, tool.[15] The language of statutes and regulations are relevant to a state's assessment of a potential deprivation's importance and to the legitimacy of a prisoner's expectations.

Considering typicality, significance, and state law as balancing factors in determining whether a prisoner's claim implicates a liberty interest will assist in the development of a coherent and principled liberty interest jurisprudence. Additionally, keying the existence of state-created liberty interests to the practice of state actors and existence of state law should enhance predictability. Actual practices

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11. *Sandin*, 515 U.S. at 480 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)); *see also* Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) ("The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer a grievous loss'" (citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring))).

12. *Sandin*, 515 U.S. at 484.

13. *See infra* text accompanying notes 252-56.

14. An analysis of significance should entail an assessment of both (1) the nature of the interest at stake in terms of whether it implicates a core constitutional value and (2) the weight of the interest as measured by the impact of the deprivation on the individual. *See Morrissey*, 408 U.S. at 481-82.

15. Although the *Sandin* Court's shift away from a purely positivist approach reflected concern about state law creating an overabundance of liberty interests, its movement away from dependence on state law could have an unintended opposite result, allowing for the existence of a liberty interest where a deprivation is atypical and significant despite the absence of state law protections. *Cf.* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 328 (1993) (asserting that exclusive reliance on positive law "would allow the states to evade due process restraints by refusing to recognize that 'property' exists").

and actual law will inform the constitutional inquiry, as opposed to a court's subjective sense of what rises to the level of a liberty interest. However unsettling the federal courts' role in defining liberty interests may seem,[16] when tethered to a methodology of using empirical practices and state law as evidentiary tools, it is a legitimate part of their traditional province.[17]

The concept of typicality begs the question of what constitutes the appropriate comparative baseline. Is the challenged behavior *X* typical as compared to *Y*, and what exactly is *Y*? The absence of a liberty interest in intra- or inter-state prison transfers[18] militates in favor of a nationwide standard for typicality. However, when factoring in the likelihood that a transfer will occur, and in light of practical problems regarding the scope of discovery ordinarily allowed in prisoner cases, statewide practices should inform the typicality baseline. Over time, as individual cases require the compilation of empirical evidence regarding state practices, a common law of typicality (or database of cases) will develop which can ease the burden of making a judgment about typicality. Although some variation from state to state is inevitable, a typicality database would assist in addressing the potential problem of outlier states with practices that fall below an otherwise uniform, nationwide range of practices. Prisoners in such states could have an actionable claim, even in the absence of state-specific positive law and even if the typical practice in that state did not require procedural due process protection.

Part I sets the doctrinal stage for understanding *Sandin* within the context of prisoners' due process jurisprudence. Part II examines the *Sandin* decision itself. Part III analyzes how the courts have applied *Sandin*, categorizes their interpretive approaches, and critiques these

16. *See* Farina, *supra* note 9, at 205 (describing the *Lochner* objection to giving an unelected, unaccountable judiciary power over the majoritarian process); *cf.* Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 Cornell L. Rev. 405, 414-16 (1977) (questioning the departure from the language of the Constitution in ascribing a broader meaning to liberty than freedom from physical restraint).

17. *Cf.* Fallon, *supra* note 15, at 328-29 (acknowledging that whether a state-created right constitutes "property" under the Due Process Clause is a mixed question of federal constitutional law and state law); Robert Jerome Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. Cal. L. Rev. 355, 366-67 (1978) (asserting that federal common law should determine the existence of constitutionally protected liberty and property rights); William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 Cornell L. Rev. 445, 473 n.84 (1977) (noting "a serious inconsistency in the manner in which the Supreme Court has tied the (wholly federal) question of the meaning of 'property' in the fourteenth amendment so tightly to technicalities of state law").

18. *See* Meachum v. Fano, 427 U.S. 215, 216 (1976) (finding no liberty interest requiring procedural due process before an intra-state prison transfer); Olim v. Wakinekona, 461 U.S. 238, 249-51 (1983) (finding no liberty interest requiring procedural due process before an inter-state prison transfer).

approaches along three continua: ease/difficulty of application, consistency/unpredictability of outcomes, and integrity/incoherence of methodology. Part IV proposes that typicality be determined through the use of empirical evidence, and that typicality, significance, and state law be used as balancing factors in determining whether a liberty interest is at stake and due process protections should apply. It also evaluates the merits of this proposal using the same criteria introduced in Part III.

I. SETTING THE STAGE: FROM *WOLFF* TO *SANDIN*

An analysis of the doctrinal developments leading up to *Sandin* is informed by a basic understanding of how prisoners' due process cases are filed and the political context in which these cases are evaluated. Prisoners alleging a violation of their civil rights generally sue under 42 U.S.C. § 1983.[19] The rules governing when state prisoners are prohibited from filing a § 1983 claim, and required instead to file a habeas corpus petition under 28 U.S.C. § 2254, which requires exhaustion of state remedies as a precondition of filing, are complex.[20] For purposes of this Article, however, the exact vehicle a prisoner uses to bring a due process claim does not affect the analysis a federal court should employ in deciding the substance of that claim.[21] Although the gross number of prisoner petitions in the twelve month period ending on September 30, 2002, declined to 55,295 from a high of 68,235 in 1996, the 2002 figure still represents approximately 20% of all civil cases commenced in federal district courts.[22] In the same

19. In 2000, 80% of prisoner petitions were filed by state prisoners, and of these 80%, more than half (53%) alleged civil rights violations under § 1983. When adding in the 20% of petitions filed by federal prisoners, approximately 44% alleged § 1983 violations, more than any other individual category of claim. *See* Bureau of Justice Statistics Special Report, Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 2 (1980-2000) (revised Feb. 5, 2002), *available at* http://www.ojp.usdoj.gov/bjs/abstract/ppfusd00.htm [hereinafter Prisoner Petitions]. Civil rights violations by federal officials are covered under § 1983 pursuant to *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

20. Although a full discussion is beyond the scope of this article, as a general matter prisoners challenging the fact or duration of their imprisonment must exhaust state remedies prior to prosecuting a federal court claim. *See* Preiser v. Rodriguez, 411 U.S. 475, 494 (1973); *see also* Edwards v. Balisok, 520 U.S. 641, 646 (1997) (requiring prisoners seeking damages based on prison disciplinary proceedings that involved the loss of good time credits to pursue habeas relief); Heck v. Humphrey, 512 U.S. 477, 486-87 (1994) (requiring prisoners seeking damages based on allegedly unlawful criminal convictions to pursue habeas relief).

21. According to the Bureau of Justice Statistics, in or before 1995, alleged due process violations accounted for 14% of habeas corpus claims and 13% of § 1983 civil rights claims. *See* Prisoner Petitions, *supra* note 19, at 5 (citing *Federal Habeas Corpus Review*, BJS Discussion Paper, NCJ 155504, Sept. 1995; *Challenging the Conditions of Prisons and Jails*, BJS Discussion Paper, NCJ 151652, Feb. 1995).

22. *See* Administrative Office of the United States Courts, 2002 Annual Report of the Director: Judicial Business of the United States Courts 132 (2002), *available at* http://www.uscourts.gov/judbus2002/appendices/c02asep02.pdf; Administrative Office

way that the Supreme Court contributed to and then sought to control the so-called due process and § 1983 litigation explosion during the 1970s,[23] it engendered and then attempted to curtail the scope of prisoners' rights litigation. Congress similarly has attempted, apparently successfully, to restrict the number of lawsuits filed by individual prisoners through the Prison Litigation Reform Act of 1995 ("PLRA"),[24] reflecting the popular notion in the 1990s of a federal judiciary "drowning in a sea of frivolous prisoner petitions."[25] Judicial weariness with prison litigation reflects in part the difficulty of distinguishing between the lawful deprivation of liberty represented by imprisonment, and the margin of constitutional rights and liberty retained by prisoners.[26] This section examines the Supreme Court's movement from the expansion of due process rights in *Wolff v. McDonnell*,[27] to the contraction of these rights in *Sandin*.

Wolff marks the beginning of the Supreme Court's reliance on a state-created liberty interest as the basis for a federal due process violation.[28] The state statute governing inmate discipline provided that misconduct would be punished by the deprivation of privileges, except when the misconduct was "flagrant or serious," in which case a prisoner could lose good time credits,[29] or be held in a disciplinary cell

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of the United States Courts, 1997 Annual Report of the Director: Judicial Business of the United States Courts 132 (1997), *available at* http://www.uscourts.gov/judicial_business/c2asep97.pdf.

23. *See* Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1268 (1975) (asserting that since its 1970 *Goldberg v. Kelly* decision, the Supreme Court has participated in a "due process explosion . . . carr[ying] the hearing requirement from one new area of government action to another"); Monaghan, *supra* note 16, at 408 (observing that the Supreme Court was "struggling to place limits on the level of federal superintendence of the operations of state and local government, a struggle which . . . occurred largely in the context of 'section 1983' actions").

24. Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 18 U.S.C. § 3626, 28 U.S.C. § 1915, 42 U.S.C. § 1997e). The Bureau of Justice Statistics noted that since the enactment of the PLRA in 1996, the number of prisoners' civil rights petitions decreased from 41,679 in 1995 to 25,504 in 2000. Controlling for the increases in prison population over time, it estimated that the PLRA resulted in 3.4 fewer civil rights petitions per month for every 3,000 state prisoners and 1 fewer petition per month for every 4,000 federal prisoners. *See* Prisoner Petitions, *supra* note 19, at 1, 7.

25. Herman, *supra* note 6, at 1293.

26. *Compare* Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country."), *with* Sandin v. Conner, 515 U.S. 472, 485 (1995) ("[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." (quoting Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119, 125 (1977) (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)))).

27. 418 U.S. at 539.

28. *See* Herman, *supra* note 10, at 506-07. In *Wolff*, the prisoner plaintiffs had challenged inter alia the prison's disciplinary proceedings, alleging that they violated the Due Process Clause of the Fourteenth Amendment. 418 U.S. at 542-43.

29. Good time credit is a reduction of the time that a prisoner must spend in prison as opposed to a reduction in the actual sentence. It is "[c]redit allowed on the sentence which is given for satisfactory conduct in prison. Introduced as an incentive

in solitary confinement.[30] Although the state statute did not establish specific disciplinary procedures,[31] prison regulations outlined the process for investigation and decision making,[32] and the particular prison, Nebraska Penal and Correctional Complex, had established specific procedures.[33] Only the Complex's unwritten procedures included specific requirements regarding a prisoner's role in the disciplinary process.[34]

The issue in *Wolff* was to determine the measure of due process required for prison disciplinary proceedings. A prisoner has obviously lost a significant measure of liberty by virtue of lawful incarceration, but the question remained, to what extent may his or her entitlement to due process be further "diminished by the needs and exigencies of the institutional environment."[35] The *Wolff* Court rejected the state's argument that a prisoner's interest in disciplinary procedures simply is not protected by the Fourteenth Amendment.[36] It reasoned that although good time credit was not specifically guaranteed under the Constitution, the fact that the state had created the right to good time credits and had provided for depriving that right only as a sanction for major misconduct indicated that "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated."[37] Thus, the Court explicitly relied on state law to support the existence of a constitutionally protected interest: A person's liberty is protected "even when the liberty itself is a statutory creation of the State."[38] *Wolff* reiterated two core concepts about due process analysis: first, that it requires an examination of the weight ("real substance") and nature ("sufficiently embraced within Fourteenth Amendment 'liberty'") of the interest, and second, that it protects against arbitrary

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for inmates, it has become practically automatically awarded. It may reduce the minimum or maximum sentence or both." Black's Law Dictionary 694 (6th ed. 1990).

30. *Wolff*, 418 U.S. at 545-47, 552 n.9, 571-72 n.19.

31. *Id.* at 548 (citing Neb. Rev. Stat. § 83-1, 107 (Cum. Supp. 1972) (requiring only that inmate be consulted when good time credit is at issue)).

32. *Id.* at 548 & n.8, 542 n.1.

33. *Id.* at 552-53 & n.10.

34. *Id.* at 552 n.10, 558-59. The process entailed having the prisoner meet with the chief correction supervisor and charging officer, and later having the Adjustment Committee read a conduct report to the prisoner who could deny the charges and ask questions of the officer who wrote the report.

35. *Id.* at 555.

36. *Id.* at 556-57.

37. *Id.* at 557; *cf.* Griffin v. Illinois, 351 U.S. 12, 18 (1956) (asserting that although there is no Fourteenth Amendment due process right to an appeal, once a state has granted appellate review, it must provide a trial transcript or its equivalent to an indigent criminal defendant).

38. *Wolff*, 418 U.S. at 558.

state action.[39] The Court organically followed the familiar two-step process of determining whether there was a due process interest at stake, and then what process was due.[40]

Wolff established limited due process protections, reversing the Eighth Circuit's decision that the procedures required for parole and probation revocation proceedings[41] were also required for prison disciplinary proceedings. The *Wolff* Court examined the "private interest that has been affected by governmental action" and the "precise nature of the government function involved."[42] Comparing the grievous loss of parole revocation (the difference between freedom and imprisonment), with the deprivation of good time credits (which may or may not affect parole eligibility or termination), the Court held that the latter is "qualitatively and quantitatively different from the revocation of parole or probation."[43] In weighing the governmental interest, the Court cited the "unwisdom" of an overly adversarial process that may "raise the level of confrontation between staff and inmate," and hinder the use of the disciplinary process as a rehabilitative tool, as well as the need for "personal security in the institution."[44]

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39. *See id.* at 557.

40. *Cf.* Bd. of Regents v. Roth, 408 U.S. 564, 570-71 (1972) (first applying a two-step due process analysis in the context of an alleged property interest).

41. In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Supreme Court found a constitutionally divined liberty interest in parole and required the following process before it could be revoked:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id. at 489; *see also id.* at 488 n.15 (collecting state statutes from 30 states requiring some type of hearing in parole revocation proceedings). These protections were similarly required for probation revocation proceedings along with a limited right to counsel. *See* Gagnon v. Scarpelli, 411 U.S. 778, 782, 790-91 (1973); *cf. Morrissey*, 408 U.S. at 489 (declining to reach or decide whether a parolee is entitled to counsel). Parole is the release from incarceration after serving part of one's sentence, and probation is a sentence of release into the community under the supervision of a probation officer. *See* Black's Law Dictionary 1116, 1202 (6th ed. 1990); *cf. Gagnon*, 411 U.S. at 782-83 n.3 (citing scholarly commentary supporting the proposition that revocation of parole and probation are constitutionally indistinguishable).

42. *Wolff*, 418 U.S. at 560 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)); *cf.* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (establishing a three-part due process balancing test involving the private interest, the probable value of a requested safeguard versus the risk of error if the safeguard is not provided, and the governmental interest).

43. *Wolff*, 418 U.S. at 561.

44. *Id.* at 563.

With respect to specific due process requirements, the *Wolff* Court held that:

> [W]ritten notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense. At least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance before the Adjustment Committee. . . . [T]here must be a "written statement by the factfinders as to the evidence relied on and reasons" for the disciplinary action.[45]

The Court conditioned an inmate's right to present evidence by calling witnesses and presenting documents on the state's assessment of whether doing so would be "unduly hazardous to institutional safety or correctional goals[,]" deferring to the judgment of prison administrators.[46] As for the due process requirement of an impartial decision maker, the *Wolff* Court concluded that the Complex's Adjustment Committee did not present "such a hazard of arbitrary decisionmaking that it should be held violative of due process of law."[47] Having found that the potential loss to the inmate implicated due process concerns, the Court narrowly prescribed specific procedures that it deemed necessary to protect prisoners' due process rights in disciplinary proceedings.[48]

In *Meachum v. Fano*,[49] the Supreme Court confirmed the significance of state law in liberty interest analysis. In holding that the Due Process Clause does not require a hearing before an intrastate prison transfer, the Court relied on the absence of state law restrictions regarding an inmate's transfer from one facility to another.[50] When considering whether transfer from a medium- to a maximum-security prison in Massachusetts was a constitutionally

45. *Id.* at 564 (quoting *Morrissey*, 408 U.S. at 489).

46. *Id.* at 566. Since the practice at the Complex was to provide a hearing before the prison's Adjustment Committee, *see id.* at 553 n.11, and presumably an opportunity for the prisoner who was the subject of the disciplinary proceedings to speak on his own behalf, the Court did not explicitly set forth a requirement that the prisoner have an opportunity to be heard. *See id.* at 581 (Marshall, J., concurring in part and dissenting in part). It denied the right to confront and cross-examine witnesses, *id.* at 567-68, and the right to retained or appointed counsel, *id.* at 569-70, but added in dicta that an inmate may be entitled to advice or assistance from another inmate or prison staff member if the inmate were illiterate or the issue at the disciplinary hearing sufficiently complex. *See id.* at 570.

47. *Id.* at 571. The Adjustment Committee was guided by the facility's written regulations and its own day-to-day procedures which required inter alia that no punishment be rendered "capriciously or in the nature of retaliation or revenge." *Id.*

48. The Court additionally extended these procedures to situations where the potential punishment was placement in solitary confinement. *See id.* at 571 n.19.

49. 427 U.S. 215 (1976).

50. *Id.* at 216; *cf.* Olim v. Wakinekona, 461 U.S. 238 (1983) (holding that interstate prison transfers similarly do not give rise to due process protections).

significant occurrence,[51] the Court held that an intrastate transfer, to a prison which it described as having conditions "which are substantially less favorable to the prisoner,"[52] did not infringe on a liberty interest under the Due Process Clause.[53] The *Meachum* Court focused on the nature of the asserted interest, as opposed to its weight, and rejected the proposition that each and every "grievous loss" or change having a "substantial adverse impact" gives rise to constitutionally mandated procedural protections.[54] The Court reasoned that since the Constitution does not require a state to have more than one prison, or to house particular inmates at particular prisons. Therefore, neither a prisoner's initial placement, nor his or her subsequent transfer to another institution in the state prison system is "subject to audit under the Due Process Clause."[55] A criminal conviction "sufficiently extinguished the defendant's liberty interest to empower the State to confine him in any of its prisons."[56] Thus, absent state law creating a protected liberty interest,

> Massachusetts prison officials have the discretion to transfer prisoners for any number of reasons. Their discretion is not limited

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51. *See Meachum*, 427 U.S. at 223-24.

52. *Id.* at 216; *see also* Herman, *supra* note 10, at 509 n.127 (noting the lack of detail regarding the disparity between conditions at the medium- and maximum-security prisons in the Supreme Court's opinion, and describing the basis in the lower court decisions for concluding that the loss to the transferred inmate was significant).

53. *See Meachum*, 427 U.S. at 223-24.

54. *Id.* at 224 (citing Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972) (holding that due process procedures were not required in a faculty layoff because the nature of the right asserted did not warrant constitutional protection, notwithstanding the fact that this was a loss of great substance)).

55. *Id.* The Court further opined that "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution." *Id.* Apart from the Due Process Clause, prisoners retain some measure of their rights under the Eighth Amendment prohibition against cruel and unusual punishment, the Fourteenth Amendment guarantee of equal protection, the Fourth Amendment prohibition against unreasonable searches, and the First Amendment right to access to courts, freedom of religion, freedom of expression, and prohibition against retaliation. *See generally* John Boston & Daniel E. Manville, Prisoners' Self-Help Litigation Manual (3d ed. 1995).

56. *Meachum*, 427 U.S. at 224. The absence of an in-depth analysis of the factual distinctions between the specific prisons at issue, *see id.* at 223, leaves open the possibility that this conclusion may not apply to a transfer to a state facility that can be characterized as qualitatively different than all other state facilities, such as, perhaps, a super-maximum prison. *See generally* Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477, 529-39 (1997) (concluding that solitary and "supermax" confinement result in damaging psychological effects following a review of the empirical literature); Human Rights Watch, Cold Storage: Super-Maximum Security Confinement in Indiana 13-42 (Oct. 1997) (describing conditions at two maximum security prisons in Indiana as inhumane and abusive), *available at* http://www.hrw.org/reports/1997/usind/; *cf.* Vitek v. Jones, 445 U.S. 480 (1980) (requiring due process before a transfer to a state mental hospital).

> to instances of serious misconduct. As we understand it no legal interest or right of these respondents under Massachusetts law would have been violated by their transfer.... Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all.[57]

The Court contrasted its refusal to "impose a nationwide rule mandating transfer hearings" under the Due Process Clause with the possibility that an individual state could create law (by statute, rule, or regulation), or interpret its state constitution to mandate a pre-transfer hearing.[58] In addition to relying on the concepts of a state-created liberty interest and what constitutes a legitimate expectation,[59] the *Meachum* Court made a policy argument in support of its decision:

> [T]o hold as we are urged to do that any substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts.[60]

The Court explicitly rejected an interpretation of the Due Process Clause that would place it "astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges."[61]

The Court's reliance on state law in analyzing prisoners' due process rights came to full fruition in *Hewitt v. Helms*.[62] In *Hewitt*, the Court considered whether an inmate's transfer from general population to administrative segregation, which is a more restrictive category of prison housing,[63] gave rise to a liberty interest protected

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57. *Meachum*, 427 U.S. at 228.

58. *Id.* at 229.

59. *Cf. Herman*, *supra* note 10, at 516-19 (asserting that the Supreme Court rejected the application of a pseudo-contractual theory regarding a de facto pardon system based solely on statistical probabilities; as well as the prisoner's misplaced reliance on a "mutually explicit understanding" that he would be paroled) (citing Jago v. Van Curen, 454 U.S. 14 (1981) (per curiam); Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981)).

60. *Meachum*, 427 U.S. at 225.

61. *Id.* at 228-29. Under the approach espoused by this Article, the Court should have engaged in an empirical analysis of intrastate transfer to determine how frequently such transfers occurred and for what reasons. Such an analysis would inform a determination of typicality and result in a better assessment of the legitimacy of an inmate's expectation that he or she not be transferred without some measure of due process.

62. 459 U.S. 460 (1983); *see also* Sandin v. Conner, 515 U.S. 472, 479 (1995) (using "full fruition" characterization).

63. Pursuant to Pennsylvania regulations, administrative segregation may be used "when an inmate poses a threat to security, when disciplinary charges are pending against an inmate, or when an inmate requires protection," *Hewitt*, 459 U.S. at 463 n.1

by the Fourteenth Amendment.[64] The plaintiff had been placed in administrative segregation for seven weeks pending a prison administrative hearing.[65] The Court explained that there are two potential sources for liberty interests, the Due Process Clause of the Fourteenth Amendment and state law.[66] It rejected the claim that the Due Process Clause itself affords protection against arbitrary placement in administrative segregation since "the conditions or degree of confinement to which the prisoner [was] subjected is within the sentence imposed . . . [and] not otherwise violative of the Constitution."[67] The *Hewitt* Court posited that placement in "less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence."[68] The Court further asserted that inmates "should reasonably anticipate" placement in the administrative segregation "at some point in their incarceration."[69] It confirmed, however, "that a

(citing 37 Pa. Code § 95.104 (1978)), while disciplinary segregation "is imposed when an inmate has been found to have committed a misconduct violation." *Id.* (citing 37 Pa. Code § 95.106 (1978)). The Court assumed that conditions in both types of segregation were the same. *See id.*; *cf. id.* at 479 n.1 (Stevens, J., dissenting) (describing conditions in administrative segregation as requiring an inmate to be in his cell virtually 24-hours a day, as opposed to approximately 14 hours a day out of his cell; with only five to ten minutes a day for exercise on three to four days a week, versus having access to the exercise yard and gym for most of the day; limited access to showers, and no access to vocational, educational, or rehabilitative programs).

64. *See id.* at 462-69.

65. *See id.* at 463-65; *see also id.* at 481 (Stevens, J., dissenting). Following the hearing, the plaintiff was sentenced to six months of disciplinary segregation. *See id.* at 465.

66. *See id.* at 466-67.

67. *Id.* at 468 (quoting Montanye v. Haymes, 427 U.S. 236, 242 (1976) (holding that there was no due process right to a hearing before being transferred from one maximum security facility to another maximum security facility). The dissent argued that the Constitution protects against arbitrary treatment; in other words, that the state cannot "single[] out one person for adverse treatment significantly different from that imposed on the community at large." *Id.* at 485 (Stevens, J., dissenting). Thus, an evaluation of the grievousness of the deprivation requires, at least in part, a comparison of "the treatment of the particular prisoner with the customary, habitual treatment of the population of the prison as a whole." *Id.* at 486 (Stevens, J., dissenting); *see also* Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (noting that "[t]he touchstone of due process is protection" from arbitrary government action).

68. *Hewitt*, 459 U.S. at 468. The Court bolstered this assessment by comparing placement in administrative segregation with deprivation of good time credits or parole, reasoning that if the Due Process Clause does not independently protect mechanisms that involve release from prison, then it does not protect the transfer within a prison to a more restrictive housing arrangement. *See id.*

69. *Id.* Since the facts in *Hewitt* involved a seven-week placement, it was not clear whether a significantly longer period of incarceration in administrative segregation should similarly be "reasonably anticipated." The Court stated in dicta that: "[A]dministrative segregation may not be used as a pretext for indefinite confinement of an inmate. Prison officials must engage in some sort of periodic review of the confinement of such inmates." *Id.* at 477 n.9. The dissenting opinion contemplated the "possibility that a prisoner might be kept in segregation simply because prison officials believe that he should be punished, even though there is insufficient evidence

State may create a liberty interest protected by the Due Process Clause through its enactment of certain statutory or regulatory measures,"[70] and held that the relevant Pennsylvania statutory provisions and administrative directive in fact gave rise to a liberty interest in remaining in the general population.[71] The *Hewitt* Court parsed the language of the relevant state law and based its holding on two factors: (1) the use of mandatory language such as "shall," "will," or "must," and (2) the use of "specified substantive predicates" such as "the need for control."[72] Thus, the fact that state law permitted administrative custody where "there is a threat of a serious disturbance or a serious threat to the individual or others," and required that an investigation of an alleged behavior violation "shall begin immediately," and that absent such violation, "the inmate must be released . . . in all cases within ten days" was dispositive.[73]

Having determined that placement in administrative segregation implicated due process protections, the Court turned to the question of what process was due. Applying a *Mathews v. Eldridge*[74] analysis, the *Hewitt* Court concluded that the plaintiff's interests were minimal, characterizing the deprivation as transfer "from one extremely restricted environment to an even more confined situation" without a "stigma of wrongdoing or misconduct" and no apparent parole consequences.[75] In contrast, the Court characterized the state's interest in placing the plaintiff in administrative segregation to protect the safety of prison guards and other inmates pending investigation of his role in a prison riot[76] as "perhaps the most fundamental

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to support a misconduct charge at a disciplinary hearing." *Id.* at 493 (Stevens, J., dissenting). It is unclear why, given the particularized reasons for placement in administrative segregation, all inmates should "reasonably anticipate" such placement.

70. *Id.* at 469. The Court reached this conclusion despite its assertion that "regulations structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to 'liberty,' different from statutes and regulations in other areas." *Id.* at 470.

71. *See id.* at 470-71 & n.6. An alternative view, then held by three members of the Court, was that state law reflects the state's recognition of the "substantiality of the deprivation" and thus provides "evidentiary support for the conclusion that the transfer [to administrative segregation] affects a constitutionally-protected interest in liberty," as opposed to creating a liberty interest. *Id.* at 488 (Stevens, J., dissenting). "Whether by formal written guidelines or by consistent unwritten practice, the State establishes the baseline of how it customarily treats the prison population." *Id.* at 486 n.12 (Stevens, J., dissenting).

72. *See id.* at 471-72; *see also id.* at 482 (Stevens, J., dissenting) (describing the Court's reliance on a "magical combination of 'substantive predicates' and 'explicitly mandatory language'").

73. *Id.* at 470 n.6 (quoting 37 Pa. Code § 95.104(b)(3) (1978)).

74. 424 U.S. 319 (1976).

75. *See Hewitt*, 459 U.S. at 473.

76. The Court described the situation as one in which multiple groups of prisoners throughout the institution attacked guards and attempted to take over the prison's control center. *See id.* at 462-63.

responsibility of the prison administration."[77] Since the procedural protection of a "detailed adversary proceeding" would not measurably assist the state's determination of whether the prisoner plaintiff posed a true safety threat, and the balance of interests weighed in favor of the state, the Court held that an "informal nonadversary review of evidence" was all that was required.[78] Due process required only that there be notice, some opportunity to be heard, and a decision maker's review of available evidence within a "reasonable" time frame.[79]

In a sense, the *Hewitt* decision contained a blueprint for limiting state-created liberty interests. All that a state legislature or administrative agency needed to do was substitute permissive language such as "may" or "should" for the mandatory language flagged by the Court as giving rise to liberty interests. Similarly, states simply could have used language that clearly gave its actors discretion rather than imposing substantive predicates that would restrict their discretion. Although the Court recognized the states' power to define which interests would and would not receive procedural due process protection,[80] prisoners' civil rights litigation during the eight years between *Hewitt* and *Sandin* continued to increase. This may reflect either that states chose not to amend laws and regulations to limit the scope of prisoners' rights, or that they made amendments that logically should have decreased the potential subject matter for litigation, but in fact made no difference.[81] Regardless, the Court in *Sandin* attempted to reassert control over liberty interest creation by requiring courts to evaluate whether an alleged deprivation is "atypical and significant."

77. *Id.* at 473.

78. *Id.* at 474. Specifically, "[a]n inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation." *Id.* at 476. Provided that some notice, "[o]rdinarily a written statement by the inmate will accomplish this purpose," is given and "the decisionmaker reviews the charges and then-available evidence against the prisoner, the Due Process Clause is satisfied." *Id.*

79. *See id.* at 476 n.8. Four members of the Court would have required additional procedural safeguards, including the opportunity to be heard in person, through an oral statement, and the right to a brief, written statement by the decision maker explaining the reasons for deciding to retain a prisoner in administrative segregation, assuming that this is the decision taken. *See id.* at 489-90, 494-95 (Stevens, J., dissenting); *id.* at 479 (Blackmun, J., concurring in part and dissenting in part). Again, under the methodology proposed in this Article, an examination of the relevant facts regarding typicality would be required.

80. Smolla, *supra* note 10, at 88-94.

81. *See* Prisoner Petitions, *supra* note 19, at 2 (reflecting that prisoners' civil rights cases increased every year from 23,594 in 1987 to 41,679 in 1995).

II. THE *SANDIN* DECISION

A. *Factual Background*

DeMont R. D. Conner filed suit in the United States District Court for the District of Hawaii while he was a prisoner at the Halawa Correctional Facility, a maximum security prison in Oahu.[82] He alleged inter alia that he had been improperly subjected to disciplinary segregation, based on the following series of events.[83] A corrections officer, Gordon Furtado, who was escorting Conner from his cell to another area of the prison, subjected him to a new strip-search procedure that Conner felt was abusive and degrading, and that led to a verbal confrontation between Conner and Furtado.[84] Furtado filed a misconduct report based on this incident, and the prison's Adjustment Committee, chaired by Cinda Sandin, the Unit Team Manager, held a hearing to consider the charges against Conner.[85] Conner was given notice of the charges against him and an opportunity to appear at the hearing, but he was not permitted to call staff witnesses who he contended would exonerate him.[86] According to a form provided to Conner following the hearing, these witnesses were unavailable "due to the move to the medium facility and being short staffed on the modules."[87] The Adjustment Committee found Conner guilty of a "high misconduct" charge for using physical interference to obstruct, hinder, or impair a correctional function, and two "low misconduct" charges for using abusive or obscene language, and for harassing a prison employee; he received a sentence of 30 days in disciplinary segregation on the "high" charge and four hours in disciplinary segregation, to be served concurrently, on the "low" charges.[88] Nine months later, after Conner had already served the 30

82. *See* Conner v. Sakai, 15 F.3d 1463, 1465 (9th Cir. 1994), *rev'd sub nom.* Sandin v. Conner, 515 U.S. 472 (1995); Brief for Petitioner at 5, Sandin v. Conner, 515 U.S. 472 (1995) (No. 93-1911).

83. *See Conner*, 15 F.3d at 1465. Conner also alleged that he had been punished for praying aloud in Arabic with another inmate, denied access to his legal materials, denied review of his confinement status, denied a copy of the written prison rules, confined pursuant to an improperly authorized and illegal "Segregation and Maximum Custody Program," improperly warned, and retaliated against for being a jailhouse lawyer. *See id.* at 1468-71.

84. *See* Brief for Petitioner at 13-14, *Sandin* (No. 93-1911) (asserting that according to Furtado's written report, Conner stripped, squatted, put both hands on the wall, and lifted his feet without incident, but objected to bending over and spreading his buttocks); *see also* Brief for Respondent at 3, *Sandin* (No. 93-1911) (describing Conner's belief that the strip search procedure was "abusive and degrading").

85. *See* Brief for Respondent at 3, *Sandin* (No. 93-1911).

86. *See Conner*, 15 F.3d at 1466-67; Brief for Respondent at 3-5, *Sandin* (No. 93-1911).

87. *Conner*, 15 F.3d at 1467.

88. *See Sandin*, 515 U.S. at 475-76; Brief for Petitioner at 14-15, *Sandin* (No. 93-1911).

days, the Deputy Administrator of the prison granted his administrative appeal, reversing the "high misconduct" finding and expunging all references to this charge from Conner's record.[89]

Prior to his disciplinary segregation, Conner had been in the prison's general population where he was permitted to work and participate in educational programs, as well as to leave his cell and interact with other prisoners for eight hours a day.[90] While in disciplinary segregation, by contrast, he spent approximately 23 out of 24 hours a day alone in his cell, and was permitted an average of 50 minutes a day "for brief exercise and shower periods, during which he nonetheless remained isolated from other inmates and was constrained by leg irons and waist chains."[91] Prisoners in disciplinary segregation were physically housed in the prison's Special Housing Unit ("SHU") which consisted of one-person cells; prisoners in protective custody and administrative segregation were also housed in SHU.[92] The restrictions placed on all prisoners in SHU were "substantially similar," except that those in disciplinary segregation received one fewer non-legal phone call and family visit per month.[93] Part of what separated the majority and dissenting opinions in *Sandin* was whether disciplinary segregation was legally different from protective custody and administrative segregation despite their factual similarities.[94]

While his administrative appeal was pending, Conner filed suit against Sandin, the Adjustment Committee chair, and other prison officials in federal district court.[95] The district court granted the defendants' motion for summary judgment and dismissed all of

89. *Sandin*, 515 U.S. at 476.

90. *See id.* at 494 (Breyer, J., dissenting); Brief for Respondent at 2, *Sandin* (No. 93-1911).

91. *Sandin*, 515 U.S. at 494 (Breyer, J., dissenting); *see also* Brief for Petitioner at 7, *Sandin* (No. 93-1911).

92. *See Sandin*, 515 U.S. at 476 n.2.

93. *See id.*; Brief for Petitioner at 7, *Sandin* (No. 93-1911). According to the petitioner, prisoners in SHU were locked down in their cells except for one 60-minute exercise period, five times per week; one ten-minute shower, five times per week; law library visits; legal and permitted family visits; court appearances; and visits related to medical and religious needs that could not be met in SHU. *See* Brief for Petitioner at 8, *Sandin* (No. 93-1911).

94. *Compare Sandin*, 515 U.S. at 486 ("[D]isciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody."), *with id.* at 489 n.1 (Ginsburg, J., dissenting) ("[D]iscipline means punishment for misconduct; it rests on a finding of wrongdoing that can adversely affect an inmate's parole prospects. Disciplinary confinement therefore cannot be bracketed with administrative segregation and protective custody, both measures that carry no long-term consequences."), *and id.* at 502 (Breyer, J., dissenting) ("How can a later decision of prison authorities transform Conner's segregation for a violation of a specific disciplinary rule into a term of segregation under the administrative rules? How can a later expungement restore to Conner the liberty that, in fact, he had already lost?").

95. *See id.* at 476.

Conner's claims,[96] but the Court of Appeals for the Ninth Circuit reversed as to his claim that "he was improperly subjected to disciplinary segregation."[97] The Ninth Circuit reasoned that the relevant state regulation fettered official discretion by requiring either an admission of guilt or "substantial evidence" of guilt prior to a finding of guilt. Absent one of these predicates, the prison disciplinary committee was not authorized to impose disciplinary segregation.[98] Thus, the Ninth Circuit held that state law gave rise to a liberty interest in avoiding disciplinary segregation,[99] and that genuine issues of material fact regarding Conner's due process right to call witnesses precluded summary judgment.[100]

B. *Majority Opinion*

In a 5-4 decision, the Supreme Court reversed.[101] Writing for the majority, Chief Justice Rehnquist revisited a series of the Court's decisions dating back two decades. The Court concluded that federal courts should abandon the interpretive approach for analyzing due process claims that had focused solely on parsing state positive law—an approach which it had established eight years earlier in *Hewitt*.[102] The *Sandin* Court started with the *Wolff* decision, reasoning that it had found a state-created liberty interest in the good time credits statutory scheme because the interest at issue, sentence reductions for

96. Conner litigated his case pro se in the district court and circuit courts. In district court, he amended his complaint twice, first to add additional defendants and a request for preliminary injunctive relief, and second to add claims that he was being retaliated against for his activities as a jailhouse lawyer. He won a preliminary injunction guaranteeing him access to the law library, but his request to be placed in protective custody to avoid harassment by prison officials and his claims for equitable relief on Eighth Amendment grounds were denied. *See* Brief for Petitioner at 16-17, *Sandin* (No. 93-1911); Brief for Respondent at 9-10, *Sandin* (No. 93-1911).

97. *Conner*, 15 F.3d at 1465 (also reversing summary judgment on Conner's claim that he was punished for praying aloud in Arabic with a fellow inmate). Conner did not raise the claim that his religious freedom was impaired in his petition for certiorari; state officials had repealed the rule under which he was disciplined for praying in Arabic. *See* Brief for Respondent at 10, *Sandin* (No. 93-1911); Brief for Petitioner at 18-19, *Sandin* (No. 93-1911).

98. *See Conner*, 15 F.3d at 1466 (citing Haw. Admin. Rule § 17-201-18(b)(2) (1983)).

99. *See id.* (citing Hewitt v. Helms, 459 U.S. 460, 466 (1983); Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 461 (1989)).

100. *See Conner*, 15 F.3d at 1467 (citing Wolff v. McDonnell, 418 U.S. 539, 566 (1974)). Since Conner had specifically identified Sandin as the defendant who had denied him the right to call witnesses, the appellate court reversed summary judgment on this claim only with respect to Sandin. *See id.* at 1467 n.5, 1468.

101. *Sandin*, 515 U.S. at 472. Chief Justice Rehnquist's majority opinion was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justices Ginsburg and Breyer wrote dissenting opinions, joined respectively by Justices Stevens and Souter. *Id.* at 473.

102. *See Sandin*, 515 U.S. at 483 n.5. Interestingly, then Justice Rehnquist was also the author of the *Hewitt* decision.

good behavior, was a matter of "real substance" and thus was weighty enough to warrant liberty interest status.[103] In discussing *Meachum*, the *Sandin* Court emphasized the distinction between liberty interests that stem directly from the Due Process Clause of the Fourteenth Amendment and those that are created by state law.[104] With respect to the latter, the Court made clear that "the Due Process Clause does not protect every change in the conditions of confinement having a substantial adverse impact on the prisoner."[105] The *Sandin* Court identified *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*[106] as a precursor to the *Hewitt* approach, and characterized the analytical error in *Greenholtz* as an overemphasis on a mechanical dichotomy between discretionary state action and state action that was mandated by state statute.[107]

The *Sandin* Court criticized *Hewitt* for losing sight of the need to evaluate the "nature" of the interest created by state law.[108] In particular, it indicated that courts should analyze whether an alleged violation gives rise to a "'grievous loss' of liberty retained even after [being] sentenced to terms of imprisonment."[109] Although a prisoner may develop an expectation of certain treatment in relation to the conditions of his or her confinement based on state law, the relevant question for the Court was whether that expectation is legitimate and enforceable.[110] The technical parsing of state law required under *Hewitt* did not inevitably lead to a finding of a state-created liberty

103. *See id.* at 478.

104. *See id.* at 478-79. Justices Breyer and Souter essentially agreed with the *Sandin* Court's description of two categories of liberty interests: first, where the deprivation is "so severe or so different from ordinary conditions of confinement" that the state must "comply ... with minimum requirements of due process," and second, where "the State's rules governing the imposition of that deprivation ... give the inmate a 'right' to avoid it." *Id.* at 493 (Breyer, J., dissenting) (quoting Vitek v. Jones, 445 U.S. 480, 491-94 (1980)). The first category involves rights protected directly under the Due Process Clause, and the second, "deprivations that are less severe or more closely related to the original terms of confinement," where "state law (including prison regulations) narrowly cabins the legal power of authorities to impose the deprivation (thereby giving the inmate a kind of right to avoid it)." *Id.* (citing *Hewitt*, 595 U.S. at 471-72).

105. *Id.* at 478.

106. 442 U.S. 1 (1979) (holding that a state statute regarding discretionary parole created a "legitimate expectation" of release under statutorily defined circumstances, but that the minimal process provided satisfied Fourteenth Amendment requirements).

107. *See Sandin*, 515 U.S. at 479.

108. *See id.* at 480 (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

109. *Id.*

110. *See id.* at 480-81; *see also id.* at 486 n.9 (finding that a "[p]risoner's subjective expectation[s]" provide "some evidence" regarding whether a deprivation exceeds or is within the sentence imposed, but are not "dispositive of the liberty interest analysis").

interest protected by constitutional due process.[111] Nevertheless, the *Sandin* Court eschewed the perceived effects of *Hewitt*'s methodology: incentivizing prisoners to "comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges"; creating "disincentives for States to codify prison management procedures in the interest of uniform treatment" to avoid inadvertently creating a liberty interest; and causing excessive "involvement of federal courts in the day-to-day management of prisons" which it characterized as a "squandering [of] judicial resources with little offsetting benefit to anyone."[112] According to *Sandin*, the shift in analytical focus from the nature of the deprivation to the language of the state regulation resulted in "negative implication jurisprudence": where state law required a particular predicate to justify a particular state action (such as major misconduct to justify a reduction in good time credits), courts were holding that the absence of that predicate prohibited that state action (no reduction in good time credits in the absence of major misconduct).[113] The *Sandin* Court also distinguished prison regulations from those regulations that define the rights and remedies afforded to the general public on two grounds: first, the purpose of prison regulations is to guide the actions of prison officials, rather than to create rights for prisoners;[114] and second, the application of negative implication jurisprudence leads to the attachment of procedural protections, as opposed to requiring state action in accordance with the negative implication.[115] Thus, the effect of the latter would be to create additional uncertainty and potential litigation regarding what process is due and whether it had been provided.

Following its critique of *Hewitt*'s methodology and aftermath, the *Sandin* Court explicitly sought to turn back the clock: "The time has come to return to the due process principles we believe were correctly established and applied in *Wolff* and *Meachum*."[116] The Court held that state-created liberty interests are "generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[117] In

111. *See, e.g.*, Olim v. Wakinekona, 461 U.S. 238, 249-50 (1983) (holding that there was no liberty interest in interstate transfer); Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 464-65 (1989) (holding that there was no liberty interest in visitation).

112. *Sandin*, 515 U.S. at 481-82. The Court did not assert or provide any support for the proposition that state legislatures and administrative agencies had in fact chosen not to codify procedures in an attempt to avoid potential litigation. *Id.*

113. *See id.* at 482.

114. *Cf.* Cort v. Ash, 422 U.S. 66 (1975). One factor in determining whether a federal statute gives rise to a private right of action is whether the statute was intended to benefit the putative plaintiff. *Id.* at 78.

115. *See Sandin*, 515 U.S. at 481-82.

116. *Id.* at 483.

117. *Id.* at 484 (internal citation omitted). The *Sandin* Court rejected the plaintiff's argument that the purpose of the state action in question is the analytical key, and

contrast, the Court characterized the interests protected directly under the Due Process Clause as those that exceed "the sentence in such an unexpected manner as to give rise to protection."[118] Other than providing two specific examples of interests arising directly from the Due Process Clause, however, the Court provided little guidance regarding such interests.[119]

Discounting dicta in *Wolff*[120] and *Baxter v. Palmigiano*[121] regarding the due process protections that should accompany placement in solitary confinement, the *Sandin* Court held that the plaintiff's "discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest."[122] It reasoned that since the plaintiff's disciplinary record was later expunged, his 30-day sentence in disciplinary segregation was identical, "with insignificant exceptions," to non-punitive housing in administrative segregation and protective custody, and that "the State's actions . . . did not work a major disruption in his environment."[123] Furthermore, parole decisions

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that actions taken for punitive reasons should give rise to protected liberty interests. *See id.* at 484. It distinguished the prohibition on punishment against pre-trial detainees and school children in *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (holding that due process prohibits the punishment of pretrial detainees), and *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) (holding that due process forbids the imposition of arbitrary corporal punishment on schoolchildren), based on the identity of the party seeking to assert the due process right and the purpose of the challenged state action. *See Sandin*, 515 U.S. at 484-85; *see also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159 (1963) (noting that procedural due process protections apply when the state seeks to revoke the citizenship of free citizens for draft evasion).

118. *Sandin*, 515 U.S. at 484. The Court reasoned that prisoners simply do not have all of the constitutional rights of people in the free world. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights," *Sandin*, 515 U.S. at 485 (quoting Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977)), and punishment within prison "in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law." *Id.*

119. The Court cited to the state action of involuntary transfer to a state mental hospital, Vitek v. Jones, 445 U.S. 480, 493 (1980), and involuntary injection with psychotropic drugs, Washington v. Harper, 494 U.S. 210, 221-22 (1990), as examples of deprivations that exceed reasonable expectations about a prison sentence. *See Sandin*, 515 U.S. at 484.

120. 418 U.S. 539, 571 n.19 (1974).

121. 425 U.S. 308, 323 (1976).

122. *Sandin*, 515 U.S. at 486.

123. *Id.* Conner's placement in disciplinary segregation did "not present a dramatic departure from the basic conditions of [the plaintiff's] indeterminate sentence." *Id.* at 485. The Court noted that Conner had been convicted of murder, kidnaping, robbery, and burglary, and sentenced to 30 years to life. *See id.* at 474-75. It is not clear whether, and if so to what degree, Conner's sentence affected the Court's analysis of what would constitute "a dramatic departure." *See id.* at 485; *cf.* Hatch v. District of Columbia, 184 F.3d 846, 856 (D.C. Cir. 1999) (concluding that "atypicality also depends in part on the length of the sentence the prisoner is serving" and holding that "courts must consider not only 'the discipline involved' but also 'the nature of the prisoner's term of incarceration' in determining 'whether a prisoner's

"rest[] on a myriad of considerations," and "[t]he chance that a finding of misconduct will alter the balance is simply too attenuated to invoke the procedural guarantees of the Due Process Clause."[124]

C. *The Ginsburg Dissent*

Justice Ginsburg, joined by Justice Stevens, did not analyze Conner's due process rights under state law, but instead reasoned that he "had a liberty interest, protected by the Fourteenth Amendment's Due Process Clause, in avoiding the disciplinary confinement he endured."[125] Justice Ginsburg characterized such confinement as a "severe alteration in the conditions of [plaintiff's] incarceration" based on the deprivation of privileges, the stigmatizing effect of disciplinary confinement as opposed to administrative segregation or protective custody, and the diminution of parole prospects.[126] Although Conner's record was ultimately expunged, she criticized the majority opinion's backward looking approach: "[H]indsight cannot tell us whether a liberty interest existed at the outset. One must, of course, know at the start the character of the interest at stake in order to determine then what process, if any, is constitutionally due."[127] Justice Ginsburg concluded, however, that although the disciplinary confinement gave rise to a liberty interest, based on the record before the Court, the process provided to Conner was all that was due.[128] The prison was not required to permit him to call staff witnesses because their "projected testimony [was] not relevant."[129]

According to Justice Ginsburg, Conner's liberty interest stemmed

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liberty is threatened.'" (quoting Franklin v. District of Columbia, 163 F.3d 625, 634 (D.C. Cir. 1998)).

124. *Sandin*, 515 U.S. at 487. Finally, the Court pointed out in a footnote that prisoners were protected from "arbitrary state action" through claims under the First and Eighth Amendments, the Equal Protection Clause of the Fourteenth Amendment, and in some cases, they additionally had state judicial review and prison grievance procedures (potential administrative remedies). *See id.* at 487 n.11.

125. *Id.* at 488 (Ginsburg, J., dissenting).

126. *Id.* at 488-89; *cf.* Monaghan, *supra* note 16, at 409-10 (noting that the Court's holding in *Paul v. Davis*, 424 U.S. 693 (1976), that reputation alone did not implicate a liberty interest, broke from the prior half century's traditions); Farina, *supra* note 9, at 193 ("*Paul v. Davis* repudiated a long line of precedent that had recognized a Meyeresque [*Meyer v. Nebraska*] liberty interest in reputation." (emphasis omitted)).

127. *Sandin*, 515 U.S. at 489 n. 1.

128. *See id.* at 491. Justice Ginsburg set out her universal theory of how due process operates, identifying "notice," and "an opportunity to respond" before a "trustworthy decisionmaker" as the critical components. *See id.* at 490 (citing Friendly, *supra* note 23, at 1278-81).

129. *Id.* at 491 (citing Wolff v. McDonnell, 418 U.S. 539, 566 (1974)). Justice Ginsburg reached this conclusion based on the disciplinary committee's asserted reliance on Conner's admissions regarding his conduct during the strip search that preceded his disciplinary confinement. *See also id.* at 504 (Breyer, J., dissenting); *cf.* Fallon, *supra* note 15, at 339-55 (discussing doctrine established in *Parratt v. Taylor*, 451 U.S. 527 (1981) (holding that where pre-deprivation process is not feasible, adequate state post-deprivation remedies preclude a federal due process claim)).

directly from the Due Process Clause as opposed to the State's prison code.[130] She reasoned that deriving liberty interests from state law would lead to the anomalous result that constitutional liberty interests that are described as being fundamental and unalienable might differ from state to state.[131] Moreover, she asserted that the methodology of state-created liberty interests creates an "incentive for ruleless prison management."[132] Finally, she criticized the "'atypical and significant'" standard articulated by the majority as providing no real guidance regarding when state-created liberty interests arise.[133] Justice Ginsburg's dissent raises important questions about the nature of due process interests and the Court's failure to provide more concrete instruction to the lower courts.

D. *The Breyer Dissent*

Justice Breyer, joined by Justice Souter, dissented because he believed that a fair application of the "atypical and significant . . . in relation to the ordinary incidents of prison life" test articulated by the majority would lead to the conclusion that placing Conner in disciplinary segregation did deprive him of a constitutionally protected liberty interest.[134] Like Justice Ginsburg, Justice Breyer concluded that placing a prisoner in disciplinary segregation for 30 days deprived him of liberty protected directly by the Due Process Clause. Unlike Justice Ginsburg, however, he found that this punishment violated the plaintiff's state-created liberty interest, based on prison disciplinary rules that "severely cabin the authority of prison officials to impose this kind of punishment."[135]

Justice Breyer attempted to explain and elaborate on *Hewitt*'s approach by constructing a framework of three categories of deprivations that would harmonize the majority opinion in *Sandin* with then current doctrine. The first category consisted of those deprivations of a prisoner's freedom that warrant due process protection regardless of state law.[136] The second covered "a broad

130. *Sandin*, 515 U.S. at 489.

131. *See id.* My proposal addresses this concern over time. Although the process initially due to a prisoner in one state may differ from that due to a prisoner in another state, once the federal courts have analyzed their state's empirical practices and positive law, and created a sufficient body of common law, a prisoner in an outlier state which fails to provide protections provided in the other 49 states could argue successfully for the process due under a uniform national standard.

132. *Id.* at 490; *see also* Herman, *supra* note 10, at 1255 n.123 ("Jurisdictions are encouraged to avoid the courts' imposition of procedure in the only way they can—by retaining the authority to act arbitrarily, thereby avoiding creating a liberty interest.").

133. *Sandin*, 515 U.S. at 490 n.2.

134. *Id.* at 491-92 (Breyer, J., dissenting).

135. *Id.* at 494.

136. These deprivations "are so severe in kind or degree (or so far removed from the original terms of confinement) that they amount to deprivations of liberty,

middle category of imposed restraints or deprivations that, considered by themselves, are neither obviously so serious as to fall within, nor obviously so insignificant as to fall without, the Clause's protection."[137] The third category was comprised of de minimis deprivations that clearly do not warrant due process protection, regardless of the existence of governing state law.[138] According to Justice Breyer, *Hewitt*'s approach of examining whether "local law creates a 'liberty' by significantly limiting the discretion of local authorities to impose a restraint," can provide a touchstone for determining whether there is a constitutionally protected liberty interest in the middle category of cases.[139]

Justice Breyer described the benefits of using *Hewitt*'s "discretion-cabining" approach in the middle category as follows: The existence of a discretion-cabining local rule suggests that the matter is more likely "to have played an important role in the life of the inmate, . . . of a kind to which procedural protections historically have applied, and where they normally prove useful."[140] In addition, the existence of such a rule indicates that the matter does "not involve highly judgmental administrative matters that call for the wise exercise of discretion," and that "the inmate will have thought that he himself, through control of his own behavior, could have avoided the deprivation, and thereby have believed that (in the absence of his misbehavior) the restraint fell outside the 'sentence imposed' upon him."[141] In other words, a governmental restraint or deprivation that is subject to such a rule is likely to hold particular significance from an inmate's point of view and to warrant procedural protections from a prison official's point of view. According to Justice Breyer, the task of identifying discretion-cabining rules can be done "fairly easily and objectively."[142] He predicted that courts would "continue to find this touchstone helpful as they seek to apply the majority's middle category standard."[143]

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irrespective of whether state law (or prison rules) 'cabin discretion.'" *Id.* at 497 (citations omitted).

137. *Id.*

138. *See id.* at 499.

139. *Id.* at 497. Justice Breyer distinguished between using local law to help determine whether there is a due process interest in property as opposed to liberty. *See id.* at 497-98. Whereas property involves the protection of "reliance upon an 'entitlement' that local (i.e., nonconstitutional) law itself has created or helped to define," *id.* at 497 (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)), liberty "protects, not this kind of reliance upon a government-conferred benefit, but rather an absence of government restraint." *Id.* at 498.

140. *Id.* at 498.

141. *Id.*

142. *Id.* at 498-99.

143. *Id.* at 499. This prediction has proven true insofar as the majority of circuits continue to rely on a *Hewitt* analysis of state law. *See infra* Part IV, text accompanying notes 253-57. With respect to the specific facts presented in *Sandin*, Justice Breyer reasoned that under the "atypical and significant" test articulated by the majority,

He further harmonized *Hewitt* and *Sandin* by interpreting the "atypical and significant" threshold as being equivalent to the upper limit of the third de minimis category.[144] Recognizing that prisons intentionally restrict prisoners' freedom, he asserted that the task of distinguishing between the second and third categories ("the unimportant from the potentially significant") is "no more difficult than many other judicial tasks."[145] My proposal would interpret the significance prong of the *Sandin* test as a de minimis test in the first instance. Thus, I would require an examination of typicality based on state practices, of state positive law, and potentially a further review of significance if the alleged deprivation passed an initial de minimus hurdle.

III. POST-*SANDIN* DEVELOPMENTS

A. *Supreme Court Case Law*

The five Supreme Court cases that have cited to *Sandin* shed little light on how typicality should be applied. In *Ohio Adult Parole Authority v. Woodard*,[146] the Court considered a death row prisoner's challenge to Ohio's clemency process under the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment.[147] The Court drew conclusions about typicality and significance, but conducted no analysis of the state's clemency practices. It held that although the prisoner had a "residual life interest" in avoiding

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Conner had suffered a significant deprivation despite (1) the similarity between conditions in disciplinary segregation and administrative segregation or protective custody, and (2) the broad discretion granted to prison officials in imposing the latter two forms of non-punitive segregation. *See Sandin*, 515 U.S. at 501-02. Unconvinced by the majority's reliance on the expungement of Conner's disciplinary record, he concluded that, in contrast to the broad rules governing non-punitive segregation, the state disciplinary rules "do cabin official discretion sufficiently" to give rise to a state-created liberty interest. *See id.* at 502.

144. *See id.* at 499 (stating that a deprivation that "is unimportant enough (or so similar in nature to ordinary imprisonment) that it rather clearly falls outside that middle category").

145. *Id.* at 500 (citing Goss v. Lopez, 419 U.S. 565, 576 (1975) (relying on "de minimis" line to define property interests)). Thus, according to Justice Breyer, filtering out the bottom layer of de minimis due process cases such as those challenging a deprivation of "television privileges, 'sack' versus 'tray' lunches, playing the state lottery, attending an ex-stepfather's funeral, or the limits of travel when on prison furlough," does not call for a type of analysis that is categorically more difficult or different. *Id.* (citations omitted).

146. 523 U.S. 272 (1998).

147. *See id.* at 277. When the Ohio Adult Parole Authority notified prisoner, Eugene Woodard that he could have a clemency interview one week before his clemency hearing, Woodard objected to the short notice and asked that his attorney be permitted to participate in the interview and hearing process. *See id.* After receiving no response to his request, Woodard filed suit in federal court asserting that his rights to due process and to remain silent had been violated. *See id.*

summary execution by prison guards, he had no due process right stemming directly from the Fourteenth Amendment to any particular clemency procedures.[148] It similarly held that Ohio's "mandatory clemency application and review procedures" did not give rise to a state-created protected interest since, ultimately, Ohio's Governor retained broad discretion to grant or deny clemency.[149] The Court asserted that "the availability of clemency, or the manner in which the State conducts clemency proceedings, does not impose [an] 'atypical and significant hardship'" because "denial of clemency merely means that the inmate must serve the sentence originally imposed."[150]

In a challenge to removal from a state pre-parole program, the Court signaled that it might consider evidence of actual state practices,[151] and even cited to state positive law,[152] but ultimately held that the Due Process Clause itself mandated procedural due process protection. In *Young v. Harper*,[153] the Court rejected the state's

148. *See id.* at 280-82. The Court reasoned that this claim was barred by *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981), which held that "an inmate has 'no constitutional or inherent right' to commutation of his sentence." *Id.* at 280. Likewise, the prisoner here had no "protected life or liberty interest in the [clemency] application process," and no "protected interest in process itself, which is not a cognizable claim." *Id.* at 279-80 n.2. The Court distinguished the holding in *Ford v. Wainwright*, 477 U.S. 399, 425 (1986), prohibiting the execution of a person who became insane after trial, based on the "substantive constitutional prohibition" under the Eighth Amendment against such executions and consequent due process protections. *See id.* at 281 n.3.

149. *See Woodard*, 523 U.S. at 282. The Court characterized a petition for clemency as a "unilateral hope," as opposed to a protected life or liberty interest. *See id.*

150. *Id.* at 283 (quoting *Sandin*, 515 U.S. at 484). In examining a strand of due process analysis, the *Woodard* Court distinguished *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (holding that a prisoner has a constitutional right to effective assistance of counsel on a first appeal as of right), on the grounds that clemency is not a part of the process of determining guilt or innocence, but rather "a matter of grace." *See id.* at 285. According to the Court, the decision to impose the death penalty "has already been made with all required due process protections." *Id.* at 285 n.5. Finally, what the Sixth Circuit characterized as a "Hobson's choice" between asserting a Fifth Amendment right and participating in the clemency interview, *see id.* at 279 (citing Woodard v. Ohio Adult Parole Auth., 107 F.3d 1178, 1189 (6th Cir. 1997), *rev'd*, 523 U.S. 272 (1998)), the Supreme Court held to be a permissible choice similar to other choices a criminal defendant must make, and thus not contrary to the Fifth Amendment privilege against compelled self-incrimination. *See id.* at 286-87.

151. The state claimed that "preparolees were always reincarcerated if the Governor denied them parole," but the Court discounted this assertion "[i]n the absence of evidence to this effect," and relied on the written rules and conditions of pre-parole release. *See* Young v. Harper, 520 U.S. 143, 151 (1997).

152. *See, e.g., id.* at 145-46, 151 & n.3 (citing to written rules and conditions of pre-parole release); *cf.* McQuillion v. Duncan, 306 F.3d 895, 902 (9th Cir. 2002) ("California's parole scheme gives rise to a cognizable liberty interest in release on parole."); Ellis v. District of Columbia, 84 F.3d 1413, 1417-18 (D.C. Cir. 1996) (stating that a liberty interest in parole survives *Sandin*).

153. 520 U.S. 143 (1997). Plaintiff Ernest Eugene Harper had been released on pre-parole by the Pardon and Parole Board which had simultaneously recommended

argument that removal from pre-parole was analogous to an intrastate prison transfer and thus did not trigger procedural protections. It described the plaintiff's participation in pre-parole as follows: "He kept his own residence; he sought, obtained, and maintained a job; and he lived a life generally free of the incidents of imprisonment."[154] The Court held that since pre-parole differed from parole in name alone, the procedural protections outlined in *Morrissey v. Brewer*[155] were required.[156]

In *McKune v. Lile*,[157] a plurality of the Court applied the "atypical and significant" test to a prisoner's Fifth Amendment challenge to participation in a Sexual Abuse Treatment Program ("SATP") that required him to provide a complete sexual history, including details of any uncharged criminal offenses.[158] Writing for the Court, Justice Kennedy concluded that the choice between losing prison privileges[159] for not participating in SATP, and "accept[ing] responsibility" by providing the required information did not constitute unconstitutional compulsion.[160] Although Justice O'Connor agreed that the plaintiff was not unconstitutionally compelled, she concurred rather than joining the plurality opinion. She agreed with the dissenting Justices "that the Fifth Amendment compulsion standard is broader than the 'atypical and significant hardship' standard we have adopted for evaluating due process claims in prisons."[161] In his dissenting opinion, Justice Stevens made no mention of the *Sandin* decision.[162] Thus, five

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him for parole. After five months in pre-parole, the Governor denied him parole, and Harper was reincarcerated. *See id.* at 145-46.

154. *Id.* at 148.

155. 408 U.S. 471 (1972); *see also supra* note 41.

156. *See Young*, 520 U.S. at 152-53.

157. 536 U.S. 24 (2002).

158. *See id.* at 30, 35-37.

159. The loss included a curtailment of "visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, [and] access to a personal television," as well as transfer "to a maximum-security unit, where his movement would be more limited, he would be moved from a two-person to a four-person cell, and he would be in a potentially more dangerous environment." *Id.* at 31; *see also id.* at 67 (Stevens, J., dissenting). Stevens described the potential loss as:

> the difference between being housed in a four-person, maximum-security cell in the most dangerous area of the prison, on the one hand, and having a key to one's own room, the right to take a shower, and the ability to move freely within adjacent areas during certain hours, on the other, . . . [as well as] visitation privileges, being able to send more than $30 per pay period to family, having access to the yard for exercise, and the opportunity to participate in group activities.

Id.

160. *See id.* at 45 (plurality opinion); *see also id.* at 52-53 (O'Connor, J., concurring).

161. *Id.* at 48 (O'Connor, J., concurring); *see also id.* at 51 ("I do not agree that the standard for compulsion is the same as the due process standard we identified in *Sandin v. Conner*.").

162. *See id.* at 54-71 (Stevens, J., dissenting).

Justices rejected the importation of the "atypical and significant" test to the realm of protection against self-incrimination.[163]

Although the plurality asserted that "[t]he *Sandin* framework provides a reasonable means of assessing whether the response of prison administrators to correctional and rehabilitative necessities are so out of the ordinary that one could sensibly say they rise to the level of unconstitutional compulsion,"[164] it provided no further guidance as to what this framework would entail.[165] The two remaining cases merely cite *Sandin* in passing.[166] In sum, the Supreme Court has left to the lower courts the work of determining how to apply the analytical tools of typicality and significance, and whether to consider state positive law.

B. *Circuit Court Case Law*

The circuit courts have, not surprisingly, been fractured in their application of *Sandin*.[167] No court has explicitly required an examination of actual state practices in conjunction with significance and state law or adopted the balancing test proposed here, but some circuits have used elements of this test. A sampling of cases, as opposed to an exhaustive survey,[168] reveals that the Second and District of Columbia Circuits employ the most factually rigorous test and come closest to employing the typicality analysis that I propose.

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163. *Cf.* Searcy v. Simmons, 299 F.3d 1220, 1225 (10th Cir. 2002) ("Because Justice O'Connor based her conclusion on the narrower ground that the KDOC's policy was not compulsion under the Fifth Amendment, we view her concurrence as the holding of the Court in *McKune*." (citing Marks v. United States, 430 U.S. 188, 193 (1977))).

164. *McKune*, 536 U.S. at 26 (plurality opinion).

165. With respect to unconstitutional compulsion, the Court suggested that the Fifth Amendment standard may collapse into the Eighth Amendment: "Courts must decide whether the consequences of an inmate's choice to remain silent are closer to the physical torture against which the Constitution clearly protects or the de minimis harms against which it does not." *Id.*

166. In *Lewis v. Casey*, 518 U.S. 343 (1996), the Court referred to *Sandin* as an example of a pro se case in which the prisoner plaintiff used court-provided forms, *see id.* at 352, and the concurring opinion cited to it in support of the argument that state administrators need flexibility "to make reasonable judgments on short notice under difficult circumstances." *Id.* at 385 (Thomas, J., concurring). In *Overton v. Bazzetta*, 123 S. Ct. 2162 (2003), the Court cited to *Sandin* in support of its conclusion that a visitation restriction for prisoners with two substance-abuse violations was not cruel and unusual punishment under the Eighth Amendment. *See id.* at 2170 ("Withdrawal of visitation privileges for a limited period . . . is not a dramatic departure from accepted standards for conditions of confinement.").

167. In contrast to the dearth of attention at the Supreme Court level, over 1,000 circuit court cases have cited to *Sandin*. On January 17, 2004, a Westlaw KeyCite search revealed that 1,058 circuit court cases had cited *Sandin*.

168. Research for this Article included the reported cases that Westlaw identified as containing a significant discussion of *Sandin*. Amy E. Sloan, Basic Legal Research: Tools and Strategies 134 (2000) ("There are four star categories: (a) examined (four stars); (b) discussed (three stars); (c) cited (two stars); and (d) mentioned (one star)."). I reviewed those cases decided before March 27, 2003 which were marked with three or four stars, indicating that they had "examined" or "discussed" *Sandin*.

In contrast, the Third and Seventh Circuits take a case law based approach that is not grounded in empirical evidence. The methodology for analyzing prisoners' due process claims in the remaining circuits is not as clearly articulated or developed. In general, the First, Fourth, Fifth, Sixth, and Eighth Circuits provide a more narrow and cursory review of these claims, while the Ninth, Tenth, and Eleventh Circuits provide a more widespread application and broad interpretation of *Sandin*.[169] Both the narrow and broad approaches reflect more of an outcome-based analysis than a principled methodology.[170] After describing each of the four categories outlined above, I evaluate them along three continua: ease/difficulty of application, consistency/unpredictability of outcomes, and integrity/incoherence of approach.

1. A Fact-Based Approach

The Second and District of Columbia Circuits have developed a fact-intensive approach to applying the *Sandin* test by virtue of having seriously considered the issue of what constitutes an "atypical and significant" hardship.[171] The Second Circuit's decision in *Welch v.*

169. As of January 17, 2004, the Eleventh Circuit had decided only 5 cases that cited *Sandin* and the First Circuit had decided 23. In contrast, the Sixth Circuit had decided more cases that cited *Sandin*, 255, than any other circuit. The Eighth Circuit was in the middle range with 44 cases that had cited *Sandin*, and the Tenth Circuit was fourth in terms of circuit court cases that cited *Sandin* with 136 cases. The remaining numbers are as follows: Second Circuit (95), Third Circuit (17), Fourth Circuit (23), Fifth Circuit (27), Seventh Circuit (156), Ninth Circuit (245), D.C. Circuit (28), and Federal (4).

170. One apparent commonality among the circuits is that they all appear to apply the *Sandin* test retroactively. Pursuant to the rule in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), requiring that a Supreme Court decision "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule," *id.* at 97, the *Sandin* standard should apply retroactively to cases that were pending at the time it was decided regardless of whether the events underlying the case predated the decision. *See* Rodgers v. Singletary, 142 F.3d 1252, 1253 (11th Cir. 1998); *accord* Mackey v. Dyke, 111 F.3d 460, 463 (6th Cir. 1997); Driscoll v. Youngman, 105 F.3d 393, 394 (8th Cir. 1997); Talley v. Hesse, 91 F.3d 1411, 1413 (10th Cir. 1996); Frazier v. Coughlin, 81 F.3d 313, 317 (2d Cir. 1996); Dominique v. Weld, 73 F.3d 1156, 1160 n.6 (1st Cir. 1996); Mujahid v. Meyer, 59 F.3d 931, 932 n.2 (9th Cir. 1995).

171. These circuits considered how to define the comparative baseline for determining the existence of a state-created liberty interest. For example, how frequently must a particular deprivation occur to be considered typical? Should a plaintiff's circumstances be compared to prisoners within his or her prison, within the state, or throughout the United States? Should a prisoner's criminal sentence factor into what is typical? For example, might the same deprivation be deemed atypical for a prisoner serving less than a year, but typical for a prisoner serving a life sentence without the possibility of parole? Because prisoners' due process cases often involve challenges to segregative housing assignments, these circuits considered other baseline questions such as what is the appropriate housing status (general population, administrative segregation, protective custody, or disciplinary segregation) for comparison. And, does the defendant's purpose for imposing the deprivation

Bartlett[172] is illustrative of this approach. In *Welch*, plaintiff Elbert Welch appealed a second time from the grant of summary judgment against him on his claim that he was placed in disciplinary confinement in the Special Housing Unit ("SHU") for ninety days without due process of law. The Second Circuit had once before remanded the case for "findings as to the nature and duration of Welch's disciplinary confinement compared to the ordinary conditions of prison life."[173] On remand, defendants submitted affidavits regarding the conditions in SHU and in the general population,[174] and statistics regarding the duration and frequency of punitive SHU placements.[175] The defendants' statistics regarding the total number and percentage of prisoners who had received SHU punishment, however, implicitly assumed the normalcy of such punishment and provided a skewed comparative baseline.[176] The statistics should have included consideration of the "deprivation typically endured by other prisoners in the ordinary course of prison administration, including

(administrative, punitive, inadvertence, or malice) make a difference? *See generally* Sealey v. Giltner, 197 F.3d 578, 588 (2d Cir. 1999) (outlining analytical factors in considering challenge to a 101-day confinement in administrative segregation); Hatch v. District of Columbia, 184 F.3d 846, 847, 856 (D.C. Cir. 1999) (focusing on the question of what constitutes the "ordinary incidents of prison life" and concluding that both the nature and length of the deprivation, as well as the plaintiff's sentence must be evaluated); Brown v. Plaut, 131 F.3d 163, 169-70 (D.C. Cir. 1997) (noting that it was unclear "which prison or part of prison is to provide the standard of comparison," and whether courts must consider the length of the segregation and compare conditions in segregation with conditions in general population) (citing Brooks v. DiFasi, 112 F.3d 46, 48-49 (2d Cir. 1997); Keenan v. Hall, 83 F.3d 1083, 1089 (9th Cir. 1996)).

172. 196 F.3d 389 (2d Cir. 1999).

173. *Id.* at 391 (citing Welch v. Bartlett, No. 96-2778, 1997 WL 568660 (2d Cir. Sept. 12, 1997)); *see also Brown*, 131 F.3d at 170 (noting split in circuits regarding the need for fact-finding) (citing Sealey v. Giltner, 116 F.3d 47, 51-52 (2d Cir. 1997)) (remanding for specific findings in challenge to six-month administrative segregation); *Mackey*, 111 F.3d at 463 (holding that six-month administrative segregation was not "atypical and significant" without discussion of conditions).

174. These affidavits indicated that SHU prisoners were locked down in their cells except for one hour of exercise per day, two showers per week, legal visits, one non-legal visit per week, and appointments with medical or other staff, as compared to general population prisoners who spend about half of the day locked down, and are released from their cells to participate in educational or vocational programming, counseling, and other activities. *See Welch*, 196 F.3d at 391-92.

175. "[O]ut of 215,701 inmates spending time at a DOCS facility between 1991 and 1996, a total of 19,963 were penalized with SHU confinement at least once . . . almost 10% of all inmates received SHU punishment," and of "the prisoners confined to the SHU, 40% were confined for less than 90 days, and about 60% for 90 days or more." *Id.* at 392. The *Welch* court implicitly assumed that the appropriate geographic scope was within New York State. *Cf. Hatch*, 184 F.3d at 856-58 (holding that appropriate geographic scope should be determined in reference to the possibility of a transfer to a more restrictive prison and the likelihood of such a transfer, i.e., a "substantial chance of [. . .] occurrence," as opposed to "more probable than not"); Wagner v. Hanks, 128 F.3d 1173, 1176 (7th Cir. 1997) (suggesting that the comparison should be with the state's and perhaps the nation's most rigorous prison).

176. *See Welch*, 196 F.3d at 394.

general population prisoners and those in various forms of administrative and protective custody," not just prisoners who had been subjected to disciplinary segregation.[177] Thus, knowing that more than half of SHU sentences are more than ninety days "does not tell whether Welch's deprivation was more serious than typically endured by prisoners as an ordinary incident of prison life."[178]

The court additionally reasoned that the defendants had failed to address allegations in Welch's affidavit that hygiene conditions in SHU were far worse than in general population,[179] and it asserted that the difference between twenty-three hours a day in one's cell when in SHU as compared to half a day when in general population "seems to us to be great."[180] Furthermore, to the extent that prisoners' access to

177. *Id.* (citing Sandin v. Conner, 515 U.S. 472, 486 (1995)). In contrast, in *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999), the D.C. Circuit parsed the language and facts of the *Sandin* decision and rejected the plaintiff's argument that the appropriate baseline is general population, the form of confinement that prison officials had "unfettered discretion" to impose. *Id.* at 855. Although the *Sandin* Court had referred to the fact that "Conner's confinement did not exceed similar, but totally discretionary, confinement in either duration or degree of restriction," 515 U.S. at 486, the *Hatch* court examined the Hawaii regulations governing the confinement referred to (administrative segregation and protective custody), and concluded that such placements were not totally discretionary. *See* 184 F.3d at 855 (citing Haw. Admin. Rule §§ 17-201-22, 17-201-23 (1983)). It reasoned that since administrative segregation functioned as a "'catchall,' a flexible management tool for ensuring safety and good order in prison," and was routinely imposed for prison management rather than punitive reasons, the *Sandin* decision mandated that conditions in administrative segregation form the comparative baseline. *Id.* at 855-56. In other words, "due process is required when segregative confinement imposes an 'atypical and significant hardship' on an inmate in relation to the most restrictive conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences." *Id.* at 847.

178. *Welch*, 196 F.3d at 394.

179. *See id.* at 393. The plaintiff alleged that SHU prisoners "receive inadequate amounts of toilet paper, soap and cleaning materials, a filthy mattress, and infrequent changes of clothes." *Id.*

180. *Id.* By way of comparison, in *Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997), plaintiff Ernest Brown raised a due process challenge to his placement in administrative segregation for ten months. *Id.* at 165. Brown was charged with disciplinary offenses for throwing an unknown substance and threatening a guard, and given notice the following day that a disciplinary hearing had been scheduled. *Id.* at 165-66. That same day, however, he was transferred to administrative segregation at a new facility where the Housing Board held a hearing, for which the plaintiff was not given advance notice, and continued Brown's administrative segregation for ten months. *Id.* at 166. Before his placement in administrative segregation, Brown "had been able to go outdoors from 8 a.m. to dusk, was permitted to move about the dormitory and interact with other inmates at all hours of the day or night, and could participate in many prison programs." *Id.* After his placement and transfer to a maximum-security facility, for the first four months, "he was in solitary confinement, and was allowed to leave his cell only to meet with visitors (while shackled, handcuffed, and belly-chained), and for two hours a week of exercise in a hallway." *Id.* For the remainder of his segregation, Brown "was in solitary confinement, but was allowed to leave his cell for two or three hours a day." *Id.*

Although *Brown* examined the three possible baselines that the *Sandin* Court may have used (conditions in administrative segregation and protective custody at the

programs while in general population may be restricted, there was no showing "either that such limitations occur with sufficient regularity to be considered typical, or that the severity of the conditions faced by a prisoner experiencing such limitations on his programs is comparable."[181] Since "[t]he record [did] not reveal whether it [was] typical for inmates not being disciplined to spend similar periods of time in similar circumstances," the Second Circuit once again remanded for further proceedings.[182]

As demonstrated in *Welch*, the fact-based approach is potentially

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particular prison at issue, conditions in general population at that prison; and a standard keyed to Conner's criminal sentence, the "range of confinement to be normally expected for one serving an indeterminate term of 30 years to life"), *see Brown*, 131 F.3d at 169 (citing *Sandin*, 515 U.S. at 486-87), the *Brown* court ultimately remanded with instructions to first decide the more narrow factual issue of whether Brown had received the process that was due. *See id.* at 165.

181. *Welch*, 196 F.3d at 393-94 (citing Lee v. Coughlin, 26 F. Supp. 2d 615, 618-29 (S.D.N.Y. 1998) (setting out comparative statistics and describing conditions in various forms of confinements)).

182. *See id.* at 394-95; *cf.* Keenan v. Hall, 83 F.3d 1083, 1088-89 (9th Cir. 1996) (remanding plaintiff's due process challenge to six-month placement in administrative segregation for comparison between conditions in the general and segregated populations, and noting that the likely effect on the duration of sentence and the duration of the segregation sentence itself were relevant). *But see* Luken v. Scott, 71 F.3d 192, 193-94 (5th Cir. 1995) (not discussing length of or conditions in segregation).

Since it remanded for further consideration of typicality, the *Welch* court did not reach the second step question of what process is due. In *Brown*, the court explained what process is due prior to placement in administrative segregation:

> An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation .... So long as this occurs, and the decisionmaker reviews the charges and the then-available evidence against the prisoner, the Due Process Clause is satisfied.

Id. at 170 (quoting Hewitt v. Helms, 459 U.S. 460, 476 (1982)); *see also* Hatch v. District of Columbia, 184 F.3d 846, 852 (D.C. Cir. 1999) (concluding that the minimum requirements of "some notice," "an opportunity to present his views" to the person making the segregation decision, and consideration of the prisoner's evidence "within a reasonable time" had not been met (quoting *Hewitt*, 459 U.S. at 476 & n.8)). Brown maintained that he was entitled to advance notice of the Housing Board's hearing as required under applicable D.C. law, namely D.C. Municipal Register title 28, section 523.1 (1987), but the court held that: "[s]tate law supplies only the substance of a liberty interest; federal constitutional law governs the procedures that are required when it is withdrawn." *Brown*, 131 F.3d at 171 n.9 (citing Archie v. City of Racine, 847 F.2d 1211, 1217 (7th Cir. 1988) (en banc)). According to the court, moreover, the required time frame for notice of the hearing is within a reasonable time after such placement; the process can be in writing or done orally; and periodic reviews are required. *See id.* at 170 (citing *Hewitt*, 459 U.S. at 476). Although a Housing Board hearing was held, it was not clear what had occurred at the hearing. The court concluded that "[i]f Brown was not provided an accurate picture of what was at stake in the hearing, then he was not given his due process." *Id.* at 172 (citing Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14-15 (1978); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950)). The record of the Housing Board hearing indicates that Brown stated that "he does not fear for his safety and that he wants to have access to a law library," which may suggest that he believed the hearing was about potentially placing him in protective custody. *Id.* at 171.

difficult to apply. Following the first remand, the lower court and litigants attempted to conduct the requisite fact-finding, and the defendant Department of Corrections provided statewide statistical information. The Second Circuit held, however, that the defendants' use of disciplinary segregation as a typicality baseline was too narrow, and it instructed them to include an analysis of prisoners in other forms of non-punitive housing, including general population.[183] Although discovery and resource issues obviously contribute to the difficulty of using this methodology,[184] over time, as courts better understand what kind of fact-finding is necessary, some of the initial "start-up" costs should dissipate. Moreover, using this approach should contribute to greater consistency in result. Setting aside the inevitable variation that arises when individual judges decide individual disputes, anchoring typicality determinations in empirical evidence should lead to greater uniformity. Finally, a fact-based approach represents a principled manner of making determinations that might otherwise be subjective and overly dependent on how well a particular case happened to have been litigated.

2. A Law-Based Approach

In contrast to the Second Circuit and the District of Columbia Circuit, the Third Circuit and to a lesser degree the Seventh Circuit have relied on case law rather than factual development in making liberty interest determinations. An examination of the following three cases from the Third Circuit demonstrates how this approach evolved and operates. In the earliest case, *Griffin v. Vaughn*,[185] plaintiff Jerome Griffin challenged his placement in administrative custody for fifteen months without a hearing.[186] The court asserted that: "[T]he baseline for determining what is 'atypical and significant'—the 'ordinary incidents of prison life'—is ascertained by what a sentenced inmate may reasonably expect to encounter as a result of his or her conviction in accordance with due process of law."[187] It reviewed the state regulations governing conditions in administrative custody,[188] and relied on regulatory language

183. The D.C. Circuit has disagreed with the Second Circuit's assertion that general population should be considered as part of the baseline, and has maintained that administrative segregation should be used. *See Hatch*, 184 F.3d at 847, 855-56.

184. These issues are discussed at greater length in Section IV.B. *infra*.

185. 112 F.3d 703 (3d Cir. 1997).

186. *Id.* at 705. Griffin was under investigation following an incident in which a female guard had been beaten and raped by a male prisoner. *Id.*

187. *Id.* at 706. The court did not, however, provide any guidance with respect to what kind of confinement should be reasonably expected, or address what frequency or length of segregation, or what geographic scope should be employed as a baseline.

188. *See id.* at 706-08. These regulations defined administrative custody as a "status of confinement for nondisciplinary reasons which provides closer supervision, control, and protection than is provided in general population." *Id.* at 706. Under the

permitting placement in administrative custody for a range of ten different reasons.[189] Without any empirical data regarding the numbers of inmates actually placed in administrative custody, or the average lengths of such confinement, the court simply declared that:

> [I]t is not extraordinary for inmates in a myriad of circumstances to find themselves exposed to the conditions to which Griffin was subjected. It is also apparent that it is not atypical for inmates to be exposed to those conditions, like Griffin, for a substantial period of time. Given the considerations that lead to transfers to administrative custody of inmates at risk from others, inmates at risk from themselves, and inmates deemed to be security risks, etc., one can conclude with confidence that stays of many months are not uncommon.[190]

Since the court held that the plaintiff's placement in administrative custody for fifteen months did not deprive him of a liberty interest, he was not entitled to any procedural due process protections.[191]

In the second case, *Fraise v. Terhune*,[192] three plaintiffs challenged a state policy allowing prison officials to transfer designated gang

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regulations, conditions in administrative custody include a limitation of non-legal visits to one per week, a limitation to one hour of exercise per day, five days per week; and a limitation of three showers per week. *Id.* at 707. It is not clear how many hours per day an inmate in administrative custody was locked down in his cell as compared to an inmate in general population.

189. *See id.* at 707-08. The cited regulation provided that an inmate "may be transferred from general population to administrative custody by order of the shift commander" for any one of ten enumerated reasons, including, among others, posing a danger to someone else or himself/herself, requiring protection from the general population, constituting an escape risk, and awaiting classification or lacking documentation regarding custody level, as well as being charged with or under investigation for a rule violation. *See id.* at 707-08; *see also* Asquith v. Dep't of Corr., 186 F.3d 407, 410-11 (3d Cir. 1999) (relying on state regulations permitting expulsion from a community release program based on a charge of a major violation in holding that the plaintiff had no liberty interest in remaining in such a program) (citing N.J. Admin. Code tit. 10A §§ 10A:20-4.21, 10A:20-4.2 (year omitted)).

190. *Griffin*, 112 F.3d at 708. The court may have sub silentio taken judicial notice of what it deemed "apparent" and what constituted a "substantial period of time" in expressing confidence that "stays of many months are not uncommon"; it did not indicate that any factual basis for these conclusions was necessary. *Id.*

191. *Id.* The plaintiff cited to mandatory language in the regulations indicating that following twenty days of confinement in administrative custody for investigative purposes, "the inmate must be charged with a misconduct and a subsequent hearing held within six days if the inmate is not to be released to population." *Id.* The court assumed that Griffin had some remedy in state court, but maintained that unless the state law at issue confers a liberty interest in avoiding an atypical and significant restraint, there is no procedural due process right. *See id.*; *see also id.* at 709 (citing Allah v. Seiverling, 229 F.3d 220, 224 (3d Cir. 2000) ("*Sandin* instructs that placement in administrative confinement will generally not create a liberty interest."); Pichardo v. Kinker, 73 F.3d 612, 613 (5th Cir. 1996) (holding that administrative confinement alone does not deprive inmates of a liberty interest); Taylor v. Reynolds, 76 F.3d 380 (6th Cir. 1996) (holding that administrative segregation is not atypical and significant)).

192. 283 F.3d 506 (3d Cir. 2002).

members to a "Security Threat Group Management Unit" ("STGMU") where they were required to participate in a behavior modification program in order to return to the general prison population.[193] The court held that the "plaintiffs were not subjected to confinement that exceeded the sentences imposed upon them or that otherwise violated the Constitution, and therefore no liberty interest created by the Due Process Clause itself was impinged."[194] Relying on *Griffin* and case law from other circuits, the court further held that the placement in administrative segregation was not atypical and significant.[195]

In *Torres v. Fauver*,[196] plaintiff Antonio Torres, a former state prisoner, alleged that his prison disciplinary conviction on an escape charge and sentence of fifteen days in disciplinary detention and 120 days in administrative segregation violated his due process rights because the disciplinary charge was not supported by substantial evidence.[197] With respect to liberty interests arising from the Due

193. *See id.* at 509. The "three-phase behavior modification and education program" consisted of instruction in "anger management, conflict resolution, and social interactive skills that feature alternatives to violence." *Id.* at 511 (citation omitted).

194. *Id.* at 522. Plaintiffs also challenged their STGMU placement under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, but the court affirmed the decision below granting summary judgment for the defendants. *See id.* at 515-23.

195. *See id.* at 523 (citing Griffin v. Vaughn, 112 F.3d 703, 706-08 (3d Cir. 1997) (holding that 15 months was not atypical and significant); Jones v. Baker, 155 F.3d 810, 813 (6th Cir. 1998) (holding that two and one-half years was not atypical and significant); Pichardo v. Kinker, 73 F.3d 612, 613 (5th Cir. 1996) (holding that placement in administrative segregation was not atypical and significant); *see also* Smith v. Mensinger, 293 F.3d 641, 652-53 (3d Cir. 2002) (holding that plaintiff's seven-month placement in disciplinary segregation, without the violation of an additional constitutional right such as access to courts, did not implicate a liberty interest and thus did not violate due process). The *Smith* court did not analyze or even describe the conditions in the STGMU.

In her opinion in *Fraise*, Judge Rendell set forth some of the written restrictions (as opposed to actual conditions) on inmates in Phase 1 of the STGMU program:

> [S]trip-searches each time they leave or return to their cells; a total of five hours per week out of their cells; a shower or shave only every third day; only a single, non-contact visit each month; only one monitored phone call per week; prohibition on correspondence with any other inmate, including incarcerated family members; all meals eaten in cells; and no access to regular prison programs.

283 F.3d at 523 n.1 (Rendell, J., dissenting on other grounds) (citation omitted). Finally, the court held that even if STGMU placement had imposed an atypical and significant hardship and given rise to a liberty interest, the procedures provided satisfied the requirements of due process. *See id.* at 523. These practices entailed notice and a hearing during which the inmate could be heard, as well as an administrative appeal and state court judicial review. *See id.*; *see also id.* at 530 n.13 (Rendell, J., dissenting) ("I will not provide my own reasoning regarding Appellants' due process claim, as I agree with that provided by the majority.").

196. 292 F.3d 141 (3d Cir. 2002).

197. *See id.* at 142-44. Following a classification committee hearing during which

Process Clause itself, the court held that Torres' transfer to "'less amenable and more restrictive quarters' did not implicate a liberty interest" since a prisoner should "reasonably anticipate" being placed in disciplinary detention and administrative segregation.[198] As for state-created liberty interests, the court asserted that "*Sandin* instructs that whether the restraint at issue 'imposes atypical and significant hardship' depends on the particular state in which the plaintiff is incarcerated."[199]

The *Torres* court then asserted that the *Fraise* decision, rendering placement in the STGMU essentially immune from due process challenge as a matter of law, was dispositive.[200] The court ignored the length of Torres' administrative segregation in light of the legality of potentially indefinite STGMU placements.[201] It similarly failed to

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he was granted placement in a minimum security prison, Torres, a paranoid schizophrenic, became convinced that his new placement would harm him, and asked the guard escorting him from the hearing if he could ask the committee to reconsider. After the guard refused, Torres said that if he were placed in the minimum security prison, he would try to escape. The guard charged him with attempting to plan an escape, and Torres was placed in pre-hearing detention. A staff psychologist later met with Torres and determined that he could return to the general population. Torres was found guilty at his disciplinary hearing and sentenced to detention, but his good-time credits were not revoked, and he was referred for a psychological evaluation. *See id.* at 143-44. Torres filed an administrative appeal, which was denied, but he did not appeal to the state court. *See id.* at 144 (citing New Jersey Court Rule 2:2-3(a)(2)).

198. *Id.* at 150 (citing Hewitt v. Helms, 459 U.S. 460, 468 (1983); *Fraise*, 283 F.3d at 522). The court did not address the question of why disciplinary detention, in particular, should be anticipated in the absence of a rule violation.

199. *Torres*, 292 F.3d at 151 (citing *Sandin*, 515 U.S. at 486). The court failed to offer any rationale for this geographic limitation, and nothing in *Sandin* imposes such a limitation, but it is likely based on the Third Circuit's focus and reliance on state positive law in the form of statutes and regulations governing prison officials.

200. *See id.* at 151 (citing *Fraise*, 283 F.3d at 522-23).

201. *See id.* ("Torres was placed in disciplinary detention for 15 days and administrative segregation for 120 days in a State where prisoners have no protected liberty interest in being free of indefinite confinement in the STGMU." (citation omitted)).

The Seventh Circuit similarly avoided fact development in *Leslie v. Doyle*, 125 F.3d 1132 (7th Cir. 1997). In *Leslie*, plaintiff Keith Leslie alleged that a correctional officer had falsely accused him of misconduct and that he was improperly sentenced to disciplinary segregation for 15 days. The court provided the following recitation of facts as viewed in the light most favorable to the plaintiff. Leslie, who has a partially paralyzed leg and must walk with a cane, was handcuffed and shackled in accordance with regular procedures when returning from a court appearance. "With his hands and feet bound, he had to hold the cane's handle in the middle of his body while he kept its other end between his feet." When he reached the first security checkpoint, defendant "Doyle asked Leslie to look at him and state his name and registration number." Although Leslie complied, Doyle repeated the order "insisting that Leslie look directly at him," and when Leslie repeated the information, Doyle let him pass. As Leslie was walking by, "Doyle grabbed Leslie's cane and shook it." *Id.* at 1133. When Leslie reached the area where inmates were searched after passing the checkpoint, Doyle was already there. Although Leslie cooperated with the officers doing the search, Doyle accused him of making trouble and sent him to administrative segregation. Two days later, Leslie received notice of disciplinary charges for

consider the validity of the purported rationale for imposing the deprivation and disregarded the different impact that segregative placements may have on different inmates.[202] Instead, the *Torres* court broadly concluded that: "*Sandin* instructs that placement in administrative confinement will generally not create a liberty interest."[203] Without discussing the conditions in disciplinary detention and administrative segregation at the prison where Torres had been incarcerated, the court held that he had failed to allege "the type of atypical, significant deprivation in which a State might conceivably create a liberty interest."[204]

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disobeying a direct order to look at Doyle and for arguing and causing a disturbance at the checkpoint and search area. An administrative review board reversed the conviction, but not until after Leslie had already served his 15 days. On appeal, Leslie included witness statements from the officer accompanying him from court and two other correctional officers who were present at his encounter with Doyle. The disciplinary review board expunged his record of these offenses, restored his classification grade, and compensated him $5.10 for prison wages he had lost while in segregation. *See id.* The district court had taken judicial notice of conditions in disciplinary segregation in Illinois prisons, based on its "extensive experience in prisoner litigation," and held that confinement for 15 days in such segregation did not constitute a "significant and atypical hardship." *Id.* at 1135. The circuit court affirmed, holding that the harm suffered was not sufficiently grave to give rise to constitutional protection, although "it [was] wrong for an official of the state to exercise force against a citizen subject only to his mood or whim, whether that citizen is free or imprisoned." *Id.* at 1138; *cf.* Thielman v. Leean, 282 F.3d 478, 483-84 (7th Cir. 2002) (holding that defendant's use of a waist belt and leg chains in addition to handcuffs during transport of plaintiff, who had been civilly committed as a sex offender, was a "small, incremental deprivation[]" that did not implicate a cognizable liberty interest). The *Leslie* court editorialized that: "This case raises disturbing questions about the nature and extent of the constitutional rights that protect state prisoners from the arbitrary and arguably lawless acts of state prison officials." 125 F.3d at 1132. It nevertheless held that Leslie's claim failed because he had received adequate procedural due process and his record had been expunged. *See id.* at 1136.

202. *Torres*, 292 F.3d at 141. For example, solitary confinement may have a more severely detrimental effect on an inmate with mental illness.

203. *Id.* at 151 (quoting Allah v. Seiverling, 229 F.3d 220, 224 (3d Cir. 2000)).

204. *Id.* (quoting *Sandin*, 515 U.S. at 486). Although to a lesser extent, the Seventh Circuit has similarly relied on law-based reasoning rather than development of a factual record. In *Thomas v. Ramos*, 130 F.3d 754 (7th Cir. 1997), plaintiff Anthony Thomas was not sentenced to any segregation time for his disciplinary charges, but remained in segregation for an extra 51 days due to prison administrative errors, for a total of approximately 70 days. *See id.* at 756-57. Relying on *Williams v. Ramos*, 71 F.3d 1246 (7th Cir. 1995), a case challenging segregation in the same institution that had been decided two years earlier, the *Thomas* court reasoned that it had "previously stated that there is no indication that persons in disciplinary segregation [at Stateville] receive treatment substantially different than that given persons in discretionary types of segregation.'" *Id.* at 762 (quoting *Williams*, 71 F.3d at 1249 n.5, 1250). In *Williams*, the plaintiff alleged that his confinement in segregation for 19 days was significantly more onerous than confinement in general population. *Williams*, 71 F.3d at 1249. The court in *Williams* held that the "catalogue of harms" described by the plaintiff, 24-hour lock down in his closed front cell; inability to participate in activities; being handcuffed whenever he left his cell for showers, medical screening, recreation; and a lack of contact with other inmates or staff did not

Using case law to analyze due process claims is relatively easier than developing a factual record on which to base judgments about typicality. A court can support its conclusion about whether a plaintiff's claim rises to the level of a liberty interest with legal research or simply take judicial notice that a claim fails the "atypical and significant" test.[205] In theory, a law-based approach should lead to consistent outcomes. But courts may draw on case law from other states and circuits, as demonstrated above in *Griffin* and *Fraise*, and there may be intra-circuit splits that work against predictability. As for integrity, this methodology lacks an objective, neutral principle for decision making. Although subsequent decisions can rely on stare decisis, the first decision, as illustrated in *Griffin*, must make assumptions or ad hoc decisions about what is "apparent" or "uncommon" in reaching a decision about typicality.

3. A Narrow Approach

The circuits that take a narrow approach tend to rely on law-based reasoning rather than fact-based analysis. Courts within these circuits appear more willing to draw factual conclusions without any underlying evidentiary support. Within this category, the Fifth Circuit stands out as the most extreme proponent of a narrow approach, concluding that only deprivations affecting the duration of a prisoner's sentence will impair a state-created liberty interest. While the First,

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"greatly exceed[] what one could expect from prison life generally." *See id.* at 1249 & n.4.

The *Thomas* court discussed the description of conditions in *Sandin* and the conclusions in *Williams*, and summarily held that the conditions of Thomas's confinement did not impose an "atypical and significant hardship." *See Thomas*, 130 F.3d at 760-62. The court recited Thomas's factual assertions regarding conditions, including that:

> [He was] "confined with another inmate in a cell that he described as approximately as wide as his outstretched arms and twice that long[,] . . . that he remained locked in this cell 24 hours a day, except those few occasions when he was allowed to visit the doctor or speak with Ramos [the superintendent of segregation;] . . . [and] that the reason he visited the doctor was for treatment of mental and physical symptoms caused by the stress of confinement.

Id. at 757-58. The court nevertheless relied on case law holding that segregation conditions in this particular facility were not "atypical and significant." *See id.* at 760-62. With respect to the differing lengths of segregation in *Sandin* (30 days) and *Williams* (19 days), and Thomas' approximately 70-day confinement in segregation, the court declared that 70 days "was obviously a relatively short period when one considers his 12 year prison sentence," and that the first 15 days of segregation constituted temporary confinement and investigative status which, unlike disciplinary segregation, do not implicate a liberty interest. *See id.* at 761. Furthermore, Thomas's extended confinement in disciplinary segregation "did not result in an atypical and significant deprivation because the conditions he experienced did not 'greatly exceed what one could expect from prison life generally.'" *Id.* at 762 (quoting *Williams*, 71 F.3d at 1249).

205. The use of judicial notice in this context is discussed further in note 246 *infra*.

Sixth, and Eighth Circuits appear to be moving in this same direction, the Fourth Circuit seems to be in the process of constructing an exhaustion of state remedies requirement as a filter for federal due process claims. This section discusses two decisions from the Fifth Circuit that, on their face, relate to length of incarceration, and one from the Fourth Circuit that involved an actual deprivation of liberty through the use of a restraint chair as examples.

In *Orellana v. Kyle*,[206] plaintiff Samuel Orellana challenged parole review procedures, alleging that "prisoners are not given advance written notice of hearings, not afforded an opportunity to be heard, denied access to all materials considered by the board, and denied the right to be accompanied by persons of their choice."[207] The court recognized that good-time credits and release on parole implicate constitutionally protected liberty interests,[208] but found it hard to conceive of "any other deprivations in the prison context, short of those that clearly impinge on the duration of confinement" that would "qualify for constitutional liberty status."[209] Although Orellana's due

206. 65 F.3d 29 (5th Cir. 1995).

207. *Id.* at 31.

208. *See id.* (citing Bd. of Pardons v. Allen, 482 U.S. 369 (1987); Wolff v. McDonnell, 418 U.S. 539 (1974)).

209. *Id.* at 31-32. The First Circuit's decision in *Dominique v. Weld*, 73 F.3d 1156 (1st Cir. 1996), similarly focused on duration of confinement. In *Dominique*, plaintiff James Dominique challenged his removal from a work release program after almost four years of successful participation, and transfer from a minimum to a medium security prison. *See id.* at 1156-57. Dominique had been transferred to a minimum security institution in 1987, permitted to renew his driver's license in connection with his work on state vehicles in 1988, and approved for the Community Work Release Program in 1990. *See id.* at 1157. He became a mechanic for a private company and the following year opened his own vehicle repair business. *See id.* Dominique alleged that "his removal resulted from media and public uproar following an incident—wholly unrelated to him," and that he "was never given a written statement of reasons for his removal." *Id.* Defendants asserted that Dominique's denial of responsibility for his crimes, the lack of accountability in his particular work release program, and his increased escape risk following three denials of parole were the cause. *See id.* at 1157.

The court rejected Dominique's contention that state regulations and the Community Release Agreement gave rise to a state-created liberty interest, reasoning that his sentence was not lengthened. *See* Hamm v. Latessa, 72 F.3d 947, 956 (1st Cir. 1995) (holding that a change in state law that delayed plaintiff's parole hearing date did not give rise to a protected liberty interest); *cf.* McGuinness v. Dubois, 75 F.3d 794, 795-98 (1st Cir. 1996) (per curiam) (assuming that the loss of 100 days of good-time credit gave rise to a liberty interest requiring some measure of procedural due process). The court additionally concluded that "his transfer to a more secure facility subjected him to conditions no different from those ordinarily experienced by large numbers of other inmates serving their sentences in customary fashion." *Dominique*, 73 F.3d at 1160. Thus the court did not use Dominique's individual experience as a basis for measuring atypicality, but rather the common practice applied to prisoners as a whole. *See id.* It took particular note of the fact that "an inmate's subjective expectations are not dispositive of the liberty-interest analysis." *Id.* (citing *Sandin*, 515 U.S. at 486 n.9); *see also* Asquith v. Dep't. of Corr., 186 F.3d 407, 412 (3d Cir. 1999) ("*Sandin* does not permit us to compare the prisoner's own life before and after the

process claim related to parole, the court relied on previously decided cases holding that the Texas parole statutes at issue did not to give rise to a liberty interest.[210] Without explaining its rationale, the court also asserted that "[i]t is unlikely . . . administrative segregation can give rise to any constitutional claim after *Sandin*."[211] The Fifth Circuit

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alleged deprivation. Rather, we must compare the prisoner's liberties after the alleged deprivation with the normal incidents of prison life." (citation omitted)). *But cf.* McQuillion v. Duncan, 306 F.3d 895, 903 (9th Cir. 2002) (holding that a prisoner who "was only six months shy of a release [on parole] that he had been affirmatively promised a decade and a half earlier had a constitutionally protected interest in freedom from confinement").

Similarly, in *Callender v. Sioux City Residential Treatment Facility*, 88 F.3d 666 (8th Cir. 1996), plaintiff James Callender challenged the defendant's revocation of his participation in a work release program. *See id.* at 667. The parole board approved him for work release, but Callender refused to admit guilt and take responsibility under the sex offender and work release program, and his work release was revoked. *See id.* The Eighth Circuit had previously found a liberty interest under the Due Process Clause itself "when a person has substantial, albeit conditional, freedom such as when he is on probation or parole." *Id.* at 668 (citing Edwards v. Lockhart, 908 F.2d 299, 301 (8th Cir. 1990)); *see also* Young v. Harper, 520 U.S. 143, 146-47 (1997) (holding that the pre-parole program at issue was sufficiently similar to parole or probation such that continued participation was protected by the Due Process Clause). But the court ruled that Callender's "work release program did not provide the sort of substantial freedom that gives rise to a liberty interest inherent in the Due Process Clause." *Callender*, 88 F.3d at 668. Callender was transferred out of the residential center two days after he had arrived, and he therefore had not earned any furlough privileges. *See id.* The court further held that Callender had no state-created liberty interest in remaining in a work release program. *See id.* at 669-70. One significant factor appeared to be that "there is no indication in the record that the duration of Mr. Callender's sentence was in any way affected by the revocation of his work release status." *Id.* at 669.

The court did not compare the conditions in the work release program with any "baseline" of incarceration; instead, it essentially assumed that the revocation of this program was not atypical and significant because "[c]learly, many inmates endured the same conditions of confinement that Mr. Callender did when he was transferred back" to the same institution he had left two or three months earlier upon being granted work release. *Id.* The court recognized that upon his return, Callender "lost all the privileges he had earned and had to start over within the institutional system"; however, it deemed that deprivation as "not atypical of what inmates have to endure in daily prison life." *Id.*

210. *See Orellana*, 65 F.3d at 32 (citing Creel v. Keene, 928 F.2d 707, 712 (5th Cir. 1991); Gilbertson v. Tex. Bd. of Pardons & Paroles, 993 F.2d 74, 75 (5th Cir. 1993)); *see also* Johnson v. Rodriguez, 110 F.3d 299, 308 (5th Cir. 1997) (holding that "Texas prisoners have no protected liberty interest in parole" and therefore cannot state a due process claim based on the parole board's procedures). *But cf. McQuillion*, 306 F.3d at 903 (limiting the reach of *Sandin*'s liberty interest analysis to internal prison disciplinary regulations in the context of plaintiff's challenge to rescission of his parole date).

211. *Orellana*, 65 F.3d at 32 n.2. The court did not address the question of typicality, apparently assuming that placement in administrative segregation, regardless of the frequency of, length of, conditions of, or reason for such placement is by definition typical.

In *Moorman v. Thalacker*, 83 F.3d 970 (8th Cir. 1996), the Eighth Circuit similarly concluded that the plaintiff's disciplinary detention for 122 days did not cause "a disruption exceeding the ordinary incidents of prison life" and thus did not give rise to a liberty interest. *See id.* at 973 (citing Meachum v. Fano, 427 U.S. 215

subsequently held that "absent extraordinary circumstances, administrative segregation as such, being an incident to the ordinary life as a prisoner, will never be a ground for a constitutional claim."[212]

(1976)); *see also* Freitas v. Ault, 109 F.3d 1335, 1337 (8th Cir. 1997) (holding that although transfer to a higher-security prison resulted in a diminution in privileges, "there is no liberty interest in assignment to any particular prison"); *cf.* Portley-El v. Brill, 288 F.3d 1063, 1065-66 (8th Cir. 2002) ("Given the likelihood that neither thirty days in punitive segregation in Minnesota nor [plaintiff's] initial reclassification to a maximum security classification in Colorado was in fact an atypical and significant hardship, the district court did not err in dismissing those claims . . . ."); Kennedy v. Blakenship, 100 F.3d 640, 643 (8th Cir. 1996) (concluding that prisoner plaintiff's transfer from administrative segregation to punitive isolation did not implicate a protected liberty interest); Wycoff v. Nichols, 94 F.3d 1187, 1190 (8th Cir. 1996) ("[Plaintiff] has no liberty interest in avoiding administrative segregation unless the conditions of his confinement present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." (internal quotations omitted)).

The Sixth Circuit, in *Jones v. Baker*, 155 F.3d 810 (6th Cir. 1998), also emphasized the importance of the effect on length of incarceration. Plaintiff Alvin Jones challenged his confinement in administrative segregation for approximately two and one-half years. *See id.* at 812. In 1993, after a prison riot during which nine inmates and one corrections officer were killed, Jones and 128 other inmates were transferred to a different prison and placed in nondisciplinary segregation, called Security Control, while the riot was investigated. Apart from a stay in Administrative Control, from June 1993 until the end of 1993, Jones remained in Security Control until January 1996 when he participated in a two-day disciplinary hearing and was found guilty, along with another prisoner, of killing the officer and was placed in Administrative Control, which is more restrictive than Security Control. Jones did not challenge his placement in Administrative Control following the January 1996 hearing. *See id.* at 811-12.

The court relied in part on case law to support its assertion that administrative segregation does not constitute an "atypical and significant" hardship. *Id.* at 812 (citing Mackey v. Dyke, 111 F.3d 460, 463 (6th Cir. 1997); Rimmer-Bey v. Brown, 62 F.3d 789, 790-91 (6th Cir. 1995)). In *Mackey*, the court deferred to the judgment of prison officials that confinement in administrative segregation for 117 extra days because of overcrowding and the lack of bed space in the general population was not "atypical and significant." *See* 111 F.3d at 463. In *Rimmer-Bey*, the court held that "[t]he plaintiff's placement in administrative segregation was not an atypical and significant hardship, as intended by *Sandin*, within the context of his life sentence." 62 F.3d at 791. It also relied on the fact that applicable state law permitted administrative segregation to "continue for an indefinite time period.'" *Jones*, 155 F.3d at 812 (quoting Ohio Admin. Code § 5120-9-13(A)). *But see id.* at 816 (Gilman, J., concurring) ("[P]roper analysis should focus not on whether the prison was authorized to place Jones in administrative segregation for any particular length of time, but rather on determining the point at which the prison had to comply with the procedural safeguards provided by the Due Process Clause in order to keep him there."). Finally, the court noted that "a liberty interest determination is to be made based on whether it will affect the overall duration of the inmate's sentence and there is no evidence here that the segregation will impact plaintiff's sentence." *Id.* at 812. Without citing to any evidence, the court summarily asserted that "the conditions of plaintiff's confinement . . . in administrative segregation and security control were not much different than that experienced by other inmates in segregation." *Id.* at 813.

212. Pichardo v. Kinker, 73 F.3d 612, 612 (5th Cir. 1996); *see also* Penrod v. Zavaras, 94 F.3d 1399, 1407 (10th Cir. 1996) (noting that "administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration" and holding that an 11-month stay in administrative

Even where good-time credits were at issue, the Fifth Circuit narrowly construed the range of protected interests under *Sandin*. In *Malchi v. Thaler*,[213] the circuit court reversed the lower court's decision "that the disciplinary decision was arbitrary and capricious and that the hearing did not meet the requirements of minimal due process."[214] The court recognized that "Texas's mandatory supervision scheme . . . for earned good time credits" gave rise to a state-created liberty interest.[215] It further held that the delay of more than six months in the plaintiff's release date due to the disciplinary action and resultant change of good-time-earning status was more than de minimis.[216] The court nevertheless distinguished between the forfeiture of "previously earned good-time credits" and the reduction in "good-time-earning status."[217] It held that "the timing of Malchi's release [was] too speculative to afford him a constitutionally cognizable claim to the 'right' to a particular time-earning status."[218]

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segregation resulting from legitimate security concerns was not atypical and significant (quoting Hewitt v. Helms, 459 U.S. 460, 468 (1983))); *cf.* Bulger v. U.S. Bureau of Prisons, 65 F.3d 48, 50 (5th Cir. 1995) (holding that "a prisoner does not have a legitimate claim of entitlement to continuing UNICOR [Federal Prison Industries] employment" notwithstanding a diminution in the ability to accrue good-time credits).

213. 211 F.3d 953 (5th Cir. 2000).

214. *Id.* at 956. The district court had found that plaintiff Dobber Malchi did not possess the contraband he was found guilty of possessing, specifically, "that there were no facts that would support the finding that Malchi was found in possession of a box of stolen envelopes." *Id.*

215. *Id.* at 957-58. Unlike parole which is "discretionary and conditional release," mandatory supervision is the "release of an eligible prisoner . . . so that the prisoner may serve the remainder of his sentence not on parole, but under the supervision and control of the pardons and paroles division." *Id.* at 957 (quoting Madison v. Parker, 104 F.3d 765, 768 (5th Cir. 1997)); *cf. Moorman*, 83 F.3d at 973 (citing Iowa Code Ann. §§ 903A.2, 903A.3 (West 1994 & Supp. 1996); Wolff v. McDonnell, 418 U.S. 539, 545 & n.5, 546 & n.6, 597 (1974) (minimizing the loss of good-time credits and distinguishing the relevant state statutes from the "mandatory" statute at issue in *Wolff* which required "flagrant or serious misconduct" before good time could be revoked)); Higgason v. Farley, 83 F.3d 807, 809-10 (7th Cir. 1996) (denying the opportunity to earn good-time credits did not inevitably affect the duration of sentence, since an inmate may not succeed in actually earning credits, and it thus "did not infringe on a protected liberty interest").

216. *See Malachi*, 211 F.3d at 958.

217. *Id.* Before the disciplinary hearing, the plaintiff had been a state-approved trustee-3, status S-3; once he had been found guilty, he became a line one, status L-1. *See id.* at 955. As an L-1, he earned less credit towards release for each day of good conduct than he had previously earned as an S-3. *See id.* at 958.

218. *Id.* at 959; *see also* Luken v. Scott, 71 F.3d 192, 193 (5th Cir. 1995) ("[L]oss of the opportunity to earn good-time credits, which might lead to earlier parole," based on placement in administrative segregation is a "speculative, collateral consequence[]" that does not create a "constitutionally protected liberty interest[]."). The *Malchi* court noted that the plaintiff

> may, without reference to this or any other disciplinary action, fail to earn the full measure of good-time credit available at S-3 status . . . . Assignment to a particular time-earning status depends on a wide variety of factors, including how long an inmate has been in the Texas prison system, his

The Fourth Circuit has not articulated a general rule that is as narrow as the Fifth Circuit's rule requiring an impact on the duration of imprisonment; however, it appears to have constructed an exhaustion requirement, mandating that plaintiffs avail themselves of potential state court remedies before pursuing a Due Process claim in federal court. In *Williams v. Benjamin*,[219] plaintiff Sylvester Williams asserted that he had been sprayed with mace, not permitted to wash it off, and then placed in four-point restraints[220] to a bare metal bed frame for more than eight hours without receiving any medical care or being allowed to use a toilet.[221] The court held that: "[t]otal immobilization in the restraints surely 'work[ed] a major disruption in his environment.'"[222] It reasoned that the relevant state regulation, Policy 1500.12, was written in mandatory language and required the presence of "enumerated substantive predicates" before mechanical restraints were used, and that the "limitations and protections" in the law evidenced the atypicality and significance of using restraints.[223]

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disciplinary record, his participation in education and work activities and the Texas good-conduct laws in effect on his offense date.

211 F.3d at 958-59 (citing Texas Dept. Crim. Justice Offender Orientation Handbook, II.D. Good Conduct Time (August 1997)); *cf.* Thompson v. Cockrell, 263 F.3d 423, 427-28 (5th Cir. 2001) (holding that deprivation of good-time credits for the calendar time that had elapsed since his erroneously premature release gave rise to a liberty interest since it would inevitably affect the duration of his confinement); Franklin v. District of Columbia, 168 F.3d 1360, 1361-62 (D.C. Cir. 1999) (Wald, J., & Tatel, J., dissenting from the denial of rehearing en banc) (arguing that the loss of good-time credits through disciplinary hearings would give rise to a liberty interest worthy of due process protections).

219. 77 F.3d 756 (4th Cir. 1996).

220. The four-point restraints "involved securing Williams to the metal bed frame with handcuffs attached to his wrists and leg shackles attached to his ankles, so that [he] was immobilized." *Id.* at 760. Thus, he was chained "to a metal bed frame in a spread-eagled position." *Id.* at 763; *cf.* Fuentes v. Wagner, 206 F.3d 335, 339-340 (3d Cir. 2000) (describing use of restraint chair which had a back that was angled at 45 degrees and in which an inmate has his arms handcuffed behind his back, his legs shackled, and restraint belts placed across his chest, lap, and ankles, where the inmate was restrained for eight hours, but released every two hours for a ten minute period of stretching, exercise, and use of the toilet).

221. *See Williams*, 77 F.3d at 760. After Williams and six other inmates had thrown water out of their cells to protest a correctional officer's threat to use mace, all seven inmates were maced and immediately stopped their protest. *See id.* at 759. The defendants maintained that the inmates had thrown "cups of unidentified foul-smelling liquids" and that pursuant to South Carolina Department of Corrections written policy, the prison medical director authorized use of the four-point restraints, a nurse checked whether the restraints had been applied properly, and a corrections officer monitored Williams every 15 minutes. *See id.* at 760; *see also id.* at 764 n.4 (citing Program Statement, CPD 5566.04, Department of Justice, Federal Bureau of Prisons § 10(d) (June 13, 1994) ("The eyes are to be flushed with cold water within five minutes of exposure, to ensure appropriate decontamination.")).

222. *Id.* at 769 (quoting Sandin v. Conner, 515 U.S. 472, 486 (1995)).

223. *See id.* Policy 1500.12 essentially requires that mechanical restraints only be used to prevent self-injury or injury to others, not as punishment or to enhance facility security, and that they not be used longer than necessary. *See id.* at 766. Policy 1500.12 incorporated portions of a federal consent decree. *See id.* at 768 (citing Plyler

Nevertheless, the court faulted Williams for failing to allege that his post-deprivation state remedies were inadequate, and failing to set forth the procedural protections that should have been provided.[224] Without delving into what post-deprivation state remedies were in fact available, the court asserted that where "full pre-deprivation procedural protections" are not possible "because of an emergency situation, there is particular reason for a federal court to conclude that post-deprivation state remedies adequately protect state-created liberty interests."[225] Accordingly, the court affirmed summary judgment for the defendants on Williams' due process claim.[226]

Compared to a law-based approach, the narrow approach taken by the First, Fifth, Sixth, and Eighth Circuits is even easier to apply and will likely lead to more consistent results. This methodology is equivalent to having a bright-line rule against finding a state-created liberty interest except in those rare circumstances where it appears certain that a prisoner's period of incarceration was lengthened as a result of the challenged action. The strengths in ease of application and consistency are counterbalanced, however, by a low integrity score. These circuits have not articulated a clear justification for their decision essentially to exempt all administrative segregation placements from due process scrutiny. With respect to the Fourth Circuit, having an exhaustion requirement will make those cases in which a prisoner has failed to exhaust easy to decide, and perhaps as a practical matter would resolve the majority of cases. But, if prisoners are able to exhaust their state remedies, then this approach provides

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v. Leeke, No. 82-876-2, 1986 WL 84459 (D.S.C. Mar. 26, 1986) (resolving an inmate class action suit)). The court also rejected the defendants' reliance on three reported cases from other circuits, finding that in each of those cases, there was an extensive factual record justifying the prolonged use of four-point restraints, and indicating compliance with correctional regulations. *See id.* at 767 (citing LeMaire v. Maass, 12 F.3d 1444 (9th Cir. 1993); Williams v. Burton, 943 F.2d 1572 (11th Cir. 1991); Bruscino v. Carlson, 854 F.2d 162, 164 (7th Cir. 1988)).

224. *See id.* at 769-70 (citing Zinermon v. Burch, 494 U.S. 113, 126-30 (1990)). It also asserted that since "the restraints were imposed in response to a disturbance . . . process [was] not possible." *Id.* at 769. The court hedged this conclusion, however, recognizing that four-point restraints could not be imposed indefinitely without any procedural due process protections, but other than implicitly holding that more than eight hours passed constitutional muster, it declined to resolve at what point, "an inmate so restrained would be entitled to some procedural protection to ensure that his liberty interest was not being arbitrarily and capriciously denied." *Id.* at 769 n.10.

225. *Id.* at 770 (citing *Zinermon*, 494 U.S. at 128 (addressing sufficiency of post-deprivation process where pre-deprivation process is impracticable)).

226. *See id.* For a similar ruling, see *Davis v. Lester*, 156 F. Supp. 2d 588, 596 (W.D. Va. 2001) (citing failure to show inadequacy of post-deprivation remedies). With respect to William's Eighth Amendment claim, the court reversed the grant of summary judgment because "[t]he record at present contains no reason for the guards' refusal to permit Williams to wash, no evidence that [he] was not in the 'immense pain' he alleges, and no justification for the extended period of time [he] was left in the restraints." 77 F.3d at 765. The court held that William's substantive due process claim added nothing to his Eighth Amendment claim. *See id.* at 768.

no guidance or benefit in terms of easy application, predictability, or integrity.

4. A Broad Approach

The circuits that take a broad approach tend to find liberty interests in more wide-ranging factual scenarios without adhering to any particular methodology for analyzing typicality, significance, or state positive law. Unlike the narrow approach which overlapped with law-based reasoning, courts that use the broad approach do not consistently rely on case law or require the development of empirical evidence. With the Fifth Circuit on one end of the spectrum, the Ninth Circuit occupies the other end, holding that the right to due process protects interests ranging from classification as a sex offender to fair dealing in the prison disciplinary process—even in the absence of an atypical and significant deprivation. A discussion of two Ninth Circuit cases, *Neal v. Shimoda*[227] and *Burnsworth v. Gunderson*,[228] illustrates this approach.

In *Neal*, prisoner plaintiff J. Neal challenged his classification as a sex offender and the requirement that he participate in the state's Sex Offender Treatment Program ("SOTP") to become eligible for parole.[229] The SOTP statute defined a sex offender as someone "having been convicted, at any time, of any sex offense or [who] engaged in sexual misconduct during the course of an offense," but Neal had pled guilty pursuant to an agreement in which the sex offense charges for which he was indicted were dismissed.[230] Relying on the Supreme Court's decision in *Vitek v. Jones*,[231] the *Neal* court reasoned that the "stigmatizing consequences" of being labeled a sex offender were analogous to those of being labeled mentally ill.[232] The

227. 131 F.3d 818 (9th Cir. 1997).

228. 179 F.3d 771 (9th Cir. 1999).

229. *See* 131 F.3d at 822. SOTP required participation in a twenty-five session psycho-educational treatment program and confession to past sex offenses as a precondition to parole eligibility. *See id.* at 822, 829.

230. *Id.* at 822.

231. 445 U.S. 480 (1980).

232. *See* 131 F.3d at 829. The court noted that although there currently was an increased medical and scientific understanding of mental illness, "when Vitek was decided in 1980, the causes of mental illness were still largely shrouded in mystery, adding to the stigma associated with mental diseases." *Id.*

In *Perkins v. Kansas Department of Corrections*, 165 F.3d 803 (10th Cir. 1999), the Tenth Circuit similarly confronted a fact scenario that raised concerns about stigmatization and singling out an individual prisoner for arbitrary treatment. Plaintiff Darren Perkins challenged the requirement that he wear a face mask whenever he left his cell, the denial of all outdoor exercise for over nine months, and the denial of medical treatment for his HIV-positive status. Perkins had spat at two prison guards over a year earlier, and from that time until the trial, he was "required to wear a face mask that covers his entire head whenever he leaves his cell and he [was] denied all exercise outside his cell." *Id.* at 806 & n.4. Since he found the face mask demeaning and emotionally and psychologically distressful, Perkins chose not to

court held that: "[t]he classification of an inmate as a sex offender is precisely the type of 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life' that the Supreme Court held created a protected liberty interest."[233] Thus, Neal, who

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leave his cell for extended periods of time, even for showers and medical appointments. *See Perkins*, 165 F.3d at 806. Perkins alleged that he was being punished because he was HIV-positive and that other prisoners had spat on guards and not been similarly punished. *See id.* He further alleged that the face mask restriction does not prevent him from spitting on inmates or guards because he could do so every time he takes a shower; that since the one incident, he has not spat on anyone; and that the face mask is simply meant to brand him as being HIV-positive and humiliate him. *See id.* at 811. The court described Perkins's conditions of confinement as alleged in his complaint as follows:

> [H]e is confined in an eight-foot by fourteen-foot concrete cell for twenty-three and one-half hours a day. He is permitted to leave his cell for thirty minutes each day, to take a shower, but he must wear the face mask when he is out of his cell. Plaintiff has not been permitted exercise outside his cell for over a year.

Id. at 809. The court flatly rejected the defendants' claim that such conditions do not pose an atypical and significant hardship because prisoners are ordinarily locked down in segregation for a variety of offenses. It stated that this assertion did "not fully address both the duration and degree of plaintiff's restrictions as compared with other inmates." *Id.*; *see also* Gaines v. Stenseng, 292 F.3d 1222, 1224 (10th Cir. 2002) (reversing dismissal of plaintiff's due process challenge to his 75-day confinement in disciplinary segregation where there was "a complete absence of evidence concerning whether the duration and conditions of the prisoner's confinement in disciplinary segregation is atypical and significant in relation to the ordinary incidents of prison life"). The court remanded Perkins's due process claim and the portion of his Eighth Amendment claim based on the face mask and exercise restriction, but affirmed the dismissal of his Eighth Amendment deliberate indifference to serious medical needs claim as a disagreement about his course of treatment. *See id.* at 810-11.

233. *Neal*, 131 F.3d at 829 (quoting Sandin v. Conner, 515 U.S. 472, 482 (1995)). The *Neal* court rejected the state's argument that the SOTP treatment program was voluntary, reasoning that an inmate was rendered "completely ineligible for parole if the treatment program [was] not satisfactorily completed." *Id. But cf.* Reed v. McKune, 298 F.3d 946, 954 (10th Cir. 2002) (holding that plaintiff's claim of parole denial based solely on failure to participate in a sexual abuse treatment program failed in light of the parole board's explicitly stated reason for denial, the "serious nature and circumstances of [his] crime").

The Eleventh Circuit analyzed another state's sex offender classification scheme in a similarly broad, but different way. In *Kirby v. Siegelman*, 195 F.3d 1285 (11th Cir. 1999), plaintiff Robert Edmond challenged his classification as a sex offender. Although he had never been convicted of a sex offense, he was classified based on charges of rape and sexual abuse that were listed in his pre-sentence report. *See id.* at 1288. The defendant further relied on information it had received from a local district attorney's office regarding allegations of sexual abuse and kidnapping. *See id.* As a consequence of his sex offender status, Kirby was required to participate in group therapy "as a prerequisite for parole eligibility" and to admit to past sexual offenses; was made ineligible for minimum custody and the work-release and community custody programs; and was allegedly subjected to the stigma that follows from sex offender status. *See id.*

The Eleventh Circuit held that although the state had not created a liberty interest, *see id.* at 1291 (holding that applicable regulations provided that "inmates with two or more arrests of record for sex crimes for which the disposition is unknown or given as dismissed, no billed, nolle prossed, etc., will be construed as sex offenders for the purpose of classification"), the Fourteenth Amendment itself gave rise to a

had never been convicted of a sex offense, was "entitled to the procedural protections outlined by the Supreme Court in *Wolff*."[234]

In contrast, *Burnsworth* did not involve an atypical or significant deprivation.[235] In *Burnsworth*, the district court had ordered the defendants to expunge plaintiff Harry Burnsworth's unsubstantiated escape conviction, and the defendants appealed.[236] The appellate court held that "even if plaintiff has demonstrated no cognizable liberty interest,"[237] a prison disciplinary hearing board violates due

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"liberty interest in not being branded a sex offender . . . [because such] a change in the prisoner's conditions of confinement is so severe that it essentially exceeds the sentence imposed by the court." *Id.* The *Kirby* court relied on the Supreme Court's conclusion that "prisoners had a liberty interest in not being transferred to a mental hospital independent of state law . . . [that] encompassed both the labeling of the inmate as mentally ill as well as the transfer to the mental hospital." *Id.* at 1292 (citing Vitek v. Jones, 445 U.S. 480, 487-88, 491 (1980)). Just as the Supreme Court had recognized the stigma associated with mental illness, *see Vitek*, 445 U.S. at 492, the Eleventh Circuit recognized that "the stigmatizing effect of being classified as a sex offender constitutes a deprivation of liberty under the Due Process Clause." *Kirby*, 195 F.3d at 1292 (citing Neal v. Shimoda, 131 F.3d 818, 829 (9th Cir. 1997)). The court explained that: "[a]n inmate who has never been convicted of a sex crime is entitled to due process before the state declares him to be a sex offender." *Id.* The court remanded because it could not determine whether Kirby had "received adequate notice and hearing to satisfy due process requirements" based on the factual record below. *Id.* at 1287, 1292.

234. *Neal*, 131 F.3d at 831; *see also supra* text accompanying notes 28-49 (discussing *Wolff*). With respect to what process is due, the *Neal* court held that "an inmate whom the prison intends to classify as a sex offender is entitled to a hearing at which he must be allowed to call witnesses and present documentary evidence in his defense," as well as "an advance statement of the reasons for that classification." *Id.* at 831 & n.14. The court contrasted the absence of any process provided to Neal with the "probable cause hearing, mental health evaluation, and full trial" required before an inmate could be labeled a sexually violent predator under another state's statute. *See id.* at 831 n.15 (citing Kansas v. Hendricks, 521 U.S. 346, 353 (1997)).

235. Burnsworth v. Gunderson, 179 F.3d 771 (9th Cir. 1999).

236. *Id.* at 773. Burnsworth's conviction was based on a conversation he had had with a corrections officer during which he asked for protective custody because he was having problems with some other inmates, and stated that if he did not receive it, his only option would be to "hit the fence." *See id.* at 772. When asked what he meant, he said that he would be forced to "hop the fence and run all the way to Tucson." *Id.*

237. *Id.* at 775. Plaintiff's escape conviction resulted in "40 hours extra duty and 30 days in Parole Class III," as well as a transfer to a maximum security facility. *See id.* at 772.

In *Bass v. Perrin*, 170 F.3d 1312 (11th Cir. 1999), the Eleventh Circuit was similarly confronted with an alleged deprivation, two hours of weekly outdoor exercise, that it could have found to fail the "atypical and significant" test. In *Bass*, the plaintiffs, who were housed in a form of solitary confinement known as "Close Management," were deprived of the two hours per week of outdoor exercise time that were ordinarily allotted in this housing. *See id.* at 1315. Plaintiff Frankie Bass was denied outdoor exercise time by virtue of his placement on the Yard Suspension List ("YSL") in October 1989 for possession of homemade weapons and other items; his time on the YSL was extended in May 1991 until May 1992, when he stabbed another inmate. *See id.* Plaintiff Leonard Bean was placed on the YSL from May 1983 until November 1991 for murdering a correctional officer and then returned to the list from April 1992 until November 1992 for possession of a homemade handcuff key. *See id.*

process when it "convicts an inmate of escape after that board holds a hearing at which no shred of evidence of the inmate's guilt is presented."[238] It parsed the three post-*Sandin* opinions in *Ohio Adult*

In April 1993, Bass and Bean attempted to escape, scaling a fence, commandeering a dump truck, and driving through the perimeter fence before they were captured. They were again placed on the YSL, at least up until they filed suit in June 1993. *See id.*

In analyzing their due process claim, the court held that the plaintiffs had asserted a cognizable state-created liberty interest within the meaning of the Fourteenth Amendment. *See id.* at 1318. The pertinent Administrative Code provision mandated that prisoners in Close Management receive two hours per week of yard time absent clear and compelling reasons to the contrary. *Id.* (citing Fla. Admin. Code Ann. r. 33-3.0083(9)(i)); *see also* Sheley v. Dugger, 833 F.2d 1420, 1424 (11th Cir. 1987) (finding the creation of liberty interests through the state administrative code). The court in *Bass* held that withholding this time met the *Sandin* "atypical and significant" hardship standard. *See* 170 F.3d at 1316 n.4, 1318 (noting example of 17th century succession to the Turkish throne in which heirs to the throne were kept in continual confinement to prevent assassination and went insane (citing Noel Barber, The Sultans 78-80 (1973))).

The court reasoned that the marginal difference between receiving and not receiving the two hours of outdoor time was substantial, and then essentially assumed that the deprivation was atypical without engaging in any empirical analysis of the frequency with which prisoners were placed on the YSL. *See id.* at 1318. Although the court below had denied the plaintiffs' request for appointment of an expert witness, Dr. Michael L. Pollock, Professor of Medicine and Director of the Center for Exercise Science at the University of Florida, who "presumably would have testified as to the potentially harmful effects of the total deprivation of outdoor exercise," *id.* at 1319-20, the Eleventh Circuit noted that such evidence might have supported the claim that placement on the YSL imposed an "atypical and significant" hardship. *See id.* at 1320.

Ultimately, however, the court held that the process provided to the plaintiffs had been sufficient to satisfy the requirements of the Due Process Clause. The court asserted that in the context of disciplinary action, due process required "(1) advance written notice of the charges; (2) a written statement of the reasons for the disciplinary action taken; and (3) the opportunity to call witnesses and present evidence, when consistent with institutional safety and correctional goals." *Id.* at 1318 (citing Young v. Jones, 37 F.3d 1457, 1459-60 (11th Cir. 1994)); *see also* Wolff v. McDonnell, 418 U.S. 539, 563-66 (1974) (same). Although the plaintiffs did not receive advance written notice of the charges before being placed on the YSL, the court held that this failure was cured by granting them a full appeal process. *See Bass*, 170 F.3d at 1319. With respect to the third requirement, the court was satisfied that the plaintiffs' past history of posing a threat to institutional safety justified denial of this opportunity, without requiring a showing that the specific instance would pose such a threat. *See id.* The court moreover asserted that "under the circumstances, the plaintiffs had no need to present evidence because the facts underlying the defendants' decision—the instances of misbehavior by the plaintiffs—were not in dispute." *Id.*

238. *Burnsworth*, 179 F.3d at 774; *see also id.* at 774-75 (citing California v. Green, 399 U.S. 149, 186 n.20 (1970) (Harlan, J., concurring) ("Due process does not permit a conviction based on no evidence."); Thompson v. City of Louisville, 362 U.S. 199, 206 (1960) ("It is "a violation of due process to convict and punish a man without evidence of his guilt.")); *cf.* Duffy v. Riveland, 98 F.3d 447, 451, 457 (9th Cir. 1996) (remanding for further fact-finding where defendants had failed to provide a deaf plaintiff with a certified interpreter at a disciplinary hearing resulting in a 15-day sentence). *But see* Mujahid v. Meyer, 59 F.3d 931, 932 (9th Cir. 1995) (rejecting plaintiff's sufficiency of the evidence challenge to disciplinary segregation placement

Parole Authority v. Woodard,[239] and relied in part on the fact that although clemency decisions are discretionary and do not give rise to a liberty interest, "a majority of the justices of the Supreme Court nonetheless believe that 'some minimal procedural safeguards apply to clemency proceedings.'"[240] The *Burnsworth* court also analogized to the right to appeal a criminal conviction and the right to parole or probation under certain conditions. Although the state is not required to afford these rights, it must use procedures that satisfy the Due Process Clause once they have been provided.[241] The court affirmed the expungement remedy, opining that "[a] contrary conclusion ignores the core of our concept of procedural due process . . . 'protection of the individual against arbitrary action of government.'"[242]

The broad approach provides little by way of specific guidance on

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for 14 days because, "[b]ased on the Supreme Court's holding in *Sandin*, . . . there [was] no liberty interest at issue").

239. 523 U.S. 272 (1998); *see also supra* text accompanying notes 147-51 (discussing *Woodard*).

240. *Burnsworth*, 179 F.3d at 775 (quoting *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment); and citing *id.* at 291 (Stevens, J., concurring in part and dissenting in part)). Justices Souter, Ginsburg and Breyer joined Justice O'Connor's concurring opinion. Justice O'Connor posited the following hypothetical: "Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment). Justice Stevens expressed his disagreement with the reasoning that "a clemency proceeding could never violate the Due Process Clause," stating that "even procedures infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence would be constitutionally acceptable" under that reasoning. *Id.* at 290-91 (Stevens, J., concurring in part and dissenting in part). One potential distinction that the *Burnsworth* court did not address, however, is the fact that clemency is clearly a matter of great significance, whereas extra duty, a change in classification, or a transfer could be considered de minimis.

241. *Burnsworth*, 179 F.3d at 775 (citing Evitts v. Lucey, 469 U.S. 387, 396 (1985) (criminal appeal); Morrissey v. Brewer, 408 U.S. 471, 480-90 (1972) (parole); Gagnon v. Scarpelli, 411 U.S. 778, 781-82 (1973) (probation)). *But see* Franklin v. District of Columbia, 163 F.3d 625, 631 (D.C. Cir. 1998) ("[U]nless an individual is threatened with losing 'liberty' within the Fifth Amendment's meaning, it is of no constitutional moment whether the individual will receive 'due process of law.'"). In *Franklin*, the plaintiffs filed a class action lawsuit on behalf of Spanish-speaking prisoners seeking qualified interpreters for parole and disciplinary hearings and in accessing medical care. *See* 163 F.3d at 628. The circuit court rejected the district court's reasoning that once the District of Columbia granted a hearing, that hearing must satisfy a basic fairness standard. *See id.* at 631-32. The circuit court analyzed Fifth rather than Fourteenth Amendment liberty interests since the District of Columbia is not a state. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954); District of Columbia v. Thompson Co., 346 U.S. 100, 104, 105 (1953).

242. 179 F.3d at 775 (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)). *But see* Strong v. Ford, No. 95-16404, 1997 WL 120757, *1 (9th Cir. Mar. 17, 1997) (holding that even if a defendant prison guard had manufactured evidence against plaintiff, that guard's actions did not infringe on a protected liberty interest because the result, a loss of 30 credit days was not an "atypical hardship").

how to analyze prisoners' due process claims, but it is consequently easy to apply since there is no methodology or procedure that must be followed. It assumes a wide definition of state-created liberty interests, and courts taking this approach can freely use law-based reasoning or fact-based analysis to support their conclusions. As compared to the three previous categories, circuits within this group provide the lowest level of consistency and highest level of unpredictability. *Burnsworth* is the paradigmatic example of this. Although the deprivation (extra duty, a temporary classification change, and a transfer) is arguably typical and of limited significance, the court nevertheless found a liberty interest. One example of inconsistent results is the disparity between the Ninth Circuit's decision in *Neal*, finding a liberty interest in sex offender classification without careful review of state positive law and by essentially assuming that the "atypical and significant" test had been met, and the Eleventh Circuit's decision in *Kirby*, finding that state regulations precluded the formation of a state-created liberty interest. Finally, the broad approach is the most incoherent of the four methodologies surveyed. Although one might approve of the outcomes, which are generally protective of prisoners' due process rights, there is no principled analytical framework for deciding cases.

IV. A POST-*SANDIN* METHODOLOGY

The following proposal is premised on the fact that the *Sandin* test has become embedded in prisoners' due process jurisprudence. It accepts typicality and significance as governing legal principles and seeks to explain how best to apply them to the difficult question of whether a due process claim implicates a state-created liberty interest.[243] Although my proposal ultimately envisions a national standard for measuring due process violations, it incorporates an evaluation of statewide practices and state positive law in the short term.

Based in part on its perception of prisoners combing through regulations in search of a viable claim, the *Sandin* Court sought to construct an additional filter that could assist courts in screening out non-meritorious cases. The Court has been only partially successful,

243. It is worthwhile to consider, however, what the effect of this standard may be over time. Does it make sense to validate what is done in the usual course and impose a requirement of procedural regularity for unusual or atypical occurrences? Part of the answer to this question depends on whether one is satisfied with the status quo. For example, a prisoner raising a due process challenge to an allegedly corrupt disciplinary hearing process may be stymied, if it turns out that the system throughout the state is administered poorly and is susceptible to accusations of corruption. In one sense, there is a possible incentive to behave poorly on a regular basis, so that one more instance of poor behavior will not be deemed atypical. Alternatively, a typicality standard creates a perverse incentive to behave randomly so that there is no uniform baseline against which to measure challenged conduct.

however, in paving the way for a quick and easy resolution of prisoners' due process claims.[244] Although courts that take a narrow approach and find no liberty interest absent a lengthened term of incarceration have adopted a relatively easy decisional rule, courts within the other three categories have struggled with the concepts of typicality and significance. *Sandin* also engendered confusion by failing to specify what role, if any, state positive law should play in liberty interest analysis. My proposal seeks to craft a method for analyzing prisoners' due process claims that is in keeping with traditional interpretations of due process rights and jurisprudence, and that will lead to rational results and the sensible development of the law. The following sections explain how my balancing test would work, and then evaluate it for ease of application, consistency of outcomes, and integrity.

A. *Explanation*

I propose that judgments about typicality be grounded in empirical evidence of actual state practices, that significance be initially applied as a de minimis threshold test, and that state positive law continue to inform liberty interest analysis. These factors should be balanced and weighed against each other so that, for example, an unusually atypical deprivation could create a liberty interest even if state law did not contain the traditional *Hewitt* elements of mandatory language, substantive predicates, and cabined discretion. Conversely, a typical practice in a state where state law explicitly requires a specific finding before that practice can occur, and limits discretion to waive that finding could also give rise to a liberty interest. A due process claim that was weak with respect to one factor could compensate for that weakness through strength in another factor. As a de minimis threshold, significance could eliminate the need to evaluate typicality or examine state law when the interest asserted clearly falls below what may warrant procedural due process protection. Once this threshold is met, however, significance could also tip the balance in favor of or against finding a liberty interest since there is a wide spectrum of potential significance above the de minimis floor.

Using empirical evidence to evaluate typicality would entail adopting the practice of the circuits within the fact-based category.[245]

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244. Experience with the development of the *Hewitt* approach indicates that state actors do not necessarily conform their behavior to avoid potential litigation. Although the *Hewitt* decision could have spurred state actors to eliminate mandatory language and substantive predicates from state statutes and regulations, and to give prison officials unfettered discretion in all aspects of prison administration, this did not occur. *See supra* text accompanying notes 62-73 (discussing *Hewitt*).

245. Although many areas of law that are associated with public policy, such as welfare law, may benefit from the use of empirical evidence, its use is especially fitting and necessary in the prisoners' rights context. The potential for abuse is high when the state has physical custody of an individual, and when there is arguably a lack of

As discussed in Part III.A., consideration of typicality first requires consideration of an appropriate baseline for comparison. The next part of this inquiry would entail gathering statistical data about the frequency with which the challenged action occurs. Using affidavits and deposition testimony to describe the conditions and circumstances of the challenged action is another mechanism for examining actual state practices.[246]

As for significance, courts have long understood how to make such determinations. In the prisoners' rights context, courts routinely determine whether a use of force is de minimis in analyzing Eighth Amendment excessive force cases.[247] Moreover, distinguishing between what is important and what is unimportant is "no more difficult than many other judicial tasks,"[248] and any alleged deprivation that is not de minimis is potentially significant.[249]

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accountability or even access to information about conditions and practices in prisons. Moreover, prisoners are particularly vulnerable by virtue of being disenfranchised in many states because of their criminal convictions.

246. Relying on empirical evidence of actual state practices can be contrasted with some courts' use of judicial notice. In *Leslie v. Doyle*, 125 F.3d 1132 (7th Cir. 1997), the Seventh Circuit implicitly approved the district court's action in taking judicial notice of disciplinary segregation conditions, as opposed to requiring any evidence regarding these conditions. The district court simply assumed that a 15-day confinement in disciplinary segregation was not "atypical and significant," as opposed to requiring evidence about average lengths of such confinement. *See id.* at 1135. It is possible that the court relied more heavily on a determination that 15 days was not significant, but it is not clear. In any event, since judicial notice is a mechanism by which a court can

> recognize the existence and truth of certain facts . . . which, from their nature, are not properly the subject of testimony, or which are universally regarded as established by common notoriety, *e.g.*, the laws of the state, international law, historical events, the constitution and course of nature, main geographical features, etc.

it does not appear to have been appropriate in this context. Black's Law Dictionary 848 (6th ed. 1990).

247. *See* Hudson v. McMillian, 503 U.S. 1, 10 (1992); *cf.* Neitzke v. Williams, 490 U.S. 319 (1989) (explaining the frivolousness standard under 28 U.S.C. § 1915(d) for dismissing in forma pauperis complaints that fail to state a claim under Federal Rule of Civil Procedure 12(b)(6)).

248. Sandin v. Conner, 515 U.S. 472, 500 (1995) (Breyer, J., dissenting) (citing Goss v. Lopez, 419 U.S. 565, 576 (1975) (de minimis line defining property interests)); *cf.* Farrar v. Hobby, 506 U.S. 103, 117 (1992) (O'Connor, J., concurring) (discussing relevance of de minimis victory for calculating attorneys' fees under 42 U.S.C. § 1988).

249. An example of how to measure significance above the de minimis threshold is found in *Carlo v. City of Chino*, 105 F.3d 493 (9th Cir. 1997). Plaintiff Mary Ann Carlo filed suit alleging that she had been denied access to a telephone following her arrest. *See id.* at 495. She had been arrested at about 12 a.m. for driving while intoxicated, taken to the county jail and held overnight. *See id.* She was denied access to a telephone, despite several requests, until about 2:00 p.m. the next day. *See id.* The court held that "the process provided by the California statute (requiring notice of the right to telephone calls and permitting denial of a requested immediate phone call only in the case of physical impossibility)" created a liberty interest. *See id.* at 497 (citing Vitek v. Jones, 445 U.S. 480, 488 (1980)). The California Penal Code gives

Using state positive law as a balancing factor means adopting the methodology outlined in *Hewitt*, but changing the interpretive value of that analysis. My proposal is to use state law as an evidentiary tool for determining whether a deprivation implicates a liberty interest and warrants procedural due process protection. An examination of state statutes and regulations for substantive predicates, mandatory language, and cabined discretion[250] can assist a court in assessing the relative importance of a particular procedure or program to the state, as well as the legitimacy of a prisoner's expectation of procedural regularity. For example, if a state has detailed statutes and regulations governing classification as a sex offender, then the very existence of that state law is evidence of the significance of the underlying issue.[251] Conversely, if a state's statute regarding placement in administrative segregation is broadly framed and gives prison officials considerable discretion, then a prisoner may not have an enforceable expectation in a particular outcome or procedure in this context.[252]

The majority of circuits continue to use *Hewitt* as a tool, either explicitly or implicitly, for analyzing due process claims.[253] The

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arrestees the right to make telephone calls, and "[w]hile the right to use a telephone may not per se rise to the level of a liberty interest protected by the procedural mandate of the Fourteenth Amendment, the right of an arrestee not to be held incommunicado involves a substantial liberty interest." *Id.* at 496 (analyzing impact of Cal. Penal Code § 851.5 (1985)).

In determining that the hardship was significant, the court cited to Carlo's inability to call an attorney which "often will be of paramount importance in marshalling evidence in defense of the charged offense," or a family member who might have enabled her to post bail and seek immediate medical attention, rather than having had to wait until the next day when the jail arranged for her to receive medical attention. *Id.* at 500. Framing the issue as being held incommunicado, rather than being delayed in using a telephone, the court concluded that the deprivation met the *Sandin* "atypical and significant" test.

250. *See supra* text accompanying notes 62-73 (discussing *Hewitt*).

251. *See, e.g.*, Neal v. Shimoda, 131 F.3d 818 (9th Cir. 1997); *see also supra* text accompanying notes 229-34 (discussing *Neal*).

252. *See, e.g.*, Griffin v. Vaughn, 112 F.3d 703 (3d Cir. 1997); *see also supra* text accompanying notes 185-91 (discussing *Griffin*).

253. *See, e.g.*, Leamer v. Fauver, 288 F.3d 532, 545 (3d Cir. 2002) (finding liberty interest in sex offender treatment where state created "a scheme in which therapy is both mandated and promised, and the Department of Corrections is without discretion to decline the obligation"); Sealey v. Giltner, 197 F.3d 578, 583-88 (2d Cir. 1999) (asserting that *Sandin* did not signal the complete abandonment of *Hewitt*, but rather imposed an additional "atypical and significant" requirement); Bass v. Perrin, 170 F.3d 1312, 1318 (11th Cir. 1999) (analyzing Florida Administrative Code provision governing solitary confinement and holding that the provision for 2 hours per week of yard time gave rise to a liberty interest); Moorman v. Thalacker, 83 F.3d 970, 973 (8th Cir. 1996) (distinguishing Iowa's good time credit statutory scheme from statute at issue in *Wolff* and finding no liberty interest); Williams v. Benjamin, 77 F.3d 756, 769 (4th Cir. 1996) (examining state regulation for mandatory language and "enumerated substantive predicates" before finding a liberty interest); Eason v. Thaler, 73 F.3d 1322, 1326 (5th Cir. 1996) (holding that plaintiff's failure to "identify a single statute, regulation or even internal policy directive" precluded the existence of

District of Columbia Circuit, however, has equivocated on this issue.[254] Similarly, the Ninth Circuit appears to have categorized cases in which *Hewitt* applies and cases in which *Sandin* applies. It has used *Hewitt* in a non-disciplinary context,[255] but has not clearly stated whether *Hewitt* would apply in a disciplinary context.[256] Despite some variation, however, there is in general a relatively uniform practice of applying *Hewitt* as an analytical tool for determining whether a prisoner's claim implicates a state-created liberty interest.[257]

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state-created liberty interest); *cf.* Jones v. Baker, 155 F.3d 810, 812 (6th Cir. 1998) (relying in part on fact that state law permitted indefinite term in administrative segregation to find no liberty interest).

254. *Compare* Franklin v. District of Columbia, 163 F.3d 625, 634 (D.C. Cir. 1998) (asserting that *Sandin* "firmly rejected" the methodology under which "District rules, regulations and guidelines, which contemplate hearings, create a due process liberty interest" in favor of a "prisoner- and discipline-specific inquiry"), *and* Brown v. Plaut, 131 F.3d 163, 170 (D.C. Cir. 1997) (identifying whether the *Sandin* test supplements or supersedes the *Hewitt* test as an unsettled question), *with* Hatch v. District of Columbia, 184 F.3d 846, 853 (D.C. Cir. 1999) (determining that D.C. regulations contained sufficiently mandatory language and substantive predicates to potentially give rise to a liberty interest), *and* Ellis v. District of Columbia, 84 F.3d 1413, 1418-19 (D.C. Cir. 1996) (examining D.C. law for mandatory language, substantive predicates, and bounded discretion while noting that the *Sandin* test "seems ill-fitted to parole eligibility determinations").

255. *See, e.g.*, Carlo v. City of Chino, 105 F.3d 493, 496 (9th Cir. 1997) (examining penal code provision giving arrestees the right to make telephone calls in finding a protected liberty interest in the right not to be held incommunicado).

256. *See* McQuillion v. Duncan, 306 F.3d 895, 903 (9th Cir. 2002) (limiting *Sandin* to internal prison disciplinary regulations, and holding that the state's parole scheme gave rise to a cognizable liberty interest); *see also Ellis*, 84 F.3d at 1418 (holding that a liberty interest in parole survives *Sandin*).

257. In light of the continued importance of state positive law in liberty interest analysis, an interesting question arises as to what constitutes state law. Is it limited to statutes promulgated by a state legislature and regulations drafted by a state department of corrections, or can it encompass an individual prison's written directives and standard operating procedures? In terms of settlement agreements, courts have reached varying conclusions regarding their import. *See* Beo v. District of Columbia, 44 F.3d 1026, 1028-29 (D.C. Cir. 1995) (holding that a settlement agreement between the District and a lone inmate could not give rise to a liberty interest); Slezak v. Evatt, 21 F.3d 590, 595-96 (4th Cir. 1994) (holding that a consent decree did not create a liberty interest because it was not self-executing and lacked sufficiently mandatory language); Smith v. Sumner, 994 F.2d 1401, 1406-07 (9th Cir. 1993) (holding that a consent decree that provided merely procedural safeguards did not create a liberty interest); DeGidio v. Pung, 920 F.2d 525, 535 (8th Cir. 1990) (holding that a consent decree did not constrain official discretion and thus did not create a liberty interest); Green v. McKaskle, 788 F.2d 1116, 1123 (5th Cir. 1986) (holding that a remedial decree could not serve as a basis for § 1983 liability); *compare* Virgili v. Gilbert, 272 F.3d 391, 394-95 (6th Cir. 2001) (declining to rule on whether a "settlement agreement is tantamount to a state regulation" and thus could give rise to a liberty interest), *and* Williams v. Benjamin, 77 F.3d 756, 769 n.8 (4th Cir. 1996) (declining to decide whether a consent decree, standing alone, could give rise to a liberty interest protected by the Due Process Clause), *with* Rodi v. Ventetuolo, 941 F.2d 22, 28 (1st Cir. 1991) (holding that consent decree gave rise to a liberty interest).

In *Chambers v. Colorado Department of Corrections*, 205 F.3d 1237 (10th Cir. 2000), the Tenth Circuit relied on a regular course of conduct by state officials rather than state positive law in finding a liberty interest. Plaintiff John Chambers

B. *Evaluation*

With respect to ease of application, a multifactor balancing test that requires the development of empirical evidence for making a typicality determination as well as consideration of significance and state law is more difficult to apply than any of the four approaches outlined in Part III. In addition to the difficulties of a fact-based approach, discussed in Part III.A., courts would be required to consider two additional factors, and then make judgments about their relative weight. One practical implication of requiring a fact-based analysis is that courts would have to allow for discovery that may be broader than they typically permit in prisoner cases. In terms of interrogatories and document requests, although state departments of corrections probably maintain some records regarding the subject matter of prisoner litigation, such as disciplinary proceedings, prisoner classification, and housing placements, these records may not be

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maintained that he had a liberty interest in continued receipt of a higher rate of earned time credits, despite his refusal to participate in the prison's Sexual Offender Treatment Program ("SOTP"), which he characterized as tantamount to accepting "a highly stigmatizing label." *Id.* at 1241. Chambers had been arrested and charged with first degree sexual assault, but had not been convicted of the charge. *Id.* at 1238. Both Chambers and the party charging sexual assault agreed that the two were living together for a short time and had been drinking on the night of the incident. *Id.* at 1238-39. Chambers asserted that the sex was consensual, and the alleged victim subsequently dropped the charges. *See id.* Chambers began serving his sentence in 1985 and was classified as a sexual offender in 1987, but he did not participate in SOTP. *See id.* at 1238. Chambers was not eligible for participation in the treatment program because he "refused to acknowledge his problems in this area." *Id.* at 1238 n.4. Instead, he "completed his GED, a basic and advanced welding class, a basic mental health program, was assigned as a law librarian in 1991, and was report free, and definitely not considered a management problem.'" *Id.* at 1238.

In 1992, five years after his initial classification, a prison case manager "recommended reducing the monthly ten days of earned time credit he received to seven days." *Id.* at 1239. "[Al]though the same factual predicates for classifying him a sex offender have existed since he was first so labeled, only in 1992 were earned time credits taken away as a consequence of the label." *Id.* at 1241. The court asserted that Chambers had no liberty interest in avoiding classification as a sex offender, but that the defendant had "through its administrative policy applied the SOTP to Mr. Chambers in such a way as to permit him to continue to receive the benefit of the maximum amount of earned time credit" even though he did not admit the status or participate in SOTP. *Id.* at 1242. Although the defendant had no discretion in deciding whether to apply the sex offender label, it appeared to have "whatever discretion it chooses in deciding what conduct satisfies the consequences of the label." *Id.* at 1243. The court held that Chambers had "a liberty interest in the consequences of the mandatory label which [the defendant] then arbitrarily removed without affording him any opportunity to a hearing to challenge the label." *Id.* Rather than limiting its inquiry to statutory entitlements, the Tenth Circuit held that the defendant's course of conduct gave rise to a state-created liberty interest.

From a prisoner's perspective what prison guards actually do on a day-to-day basis may be a more significant and real manifestation of the law than what is written in state regulations. *But cf.* Sandin v. Conner, 515 U.S. 472, 481-82 (1995) (asserting that the purpose of prison regulations is to provide guidance to prison officials as opposed to rights for prisoners).

complete, and they may not be compiled in a usable form. Another possibility is that the state may not have the requisite computer capacity to organize this information. All of these potential problems would, however, dissipate over time, as departments of corrections realized the need to collect and maintain a database of such information. Each state's department of corrections could gather relevant data, such as the numbers and percentages of prisoners who are placed in various kinds of segregated housing and the average lengths of stay in such housing, from the various prisons within the state. Preparing affidavits and/or taking and defending depositions would also impose a cost on the state.

In terms of who has the burden of proving typicality, the state would be more capable of gathering evidence than the typical pro se prisoner plaintiff.[258] Placing the burden of production, and possibly persuasion, on the defendant also accords with the reality that statistical information regarding the typicality of occurrences such as a housing placement (in disciplinary or administrative segregation) for a specific duration (case law revealed a range of fifteen days to eight years) is exclusively in the defendant's possession. An alternative solution might be to appoint counsel for individual prisoners alleging due process violations,[259] or perhaps classes of prisoners making such allegations.[260] Appointed counsel may also help to prevent the need for a remand following an appeal.[261]

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258. In *Colon v. Howard*, the court faulted the defendant for failing to adduce any evidence of typicality at trial or to produce "any data showing that New York frequently removes prisoners from general population for as long as the 305 days that [the plaintiff] served." 215 F.3d 227, 231 (2d Cir. 2000). Rather than requiring the plaintiff to prove atypicality, the court gave the defendant the burden of proving typicality. *See id.*

259. *See id.* at 232 (noting that a factual record including "evidence of the psychological effects of prolonged confinement in isolation and the precise frequency of SHU confinements of varying durations . . . will more likely result if counsel is appointed for the prisoner"); Welch v. Bartlett, 196 F.3d 389, 395 n.5 (2d Cir. 1999). The *Welch* court stated that:

> In an early case that may establish binding law as to whether periods in the SHU deprive prisoners of liberty under the Due Process Clause, it is important for the court to be presented with a full and accurate picture of the comparison between SHU confinement and the ordinary incidents of prison life. An unrepresented prisoner may be incapable of presenting all the pertinent evidence on his side.

Id.

260. Both circuits that have taken a fact-based approach, the Second and District of Columbia Circuits, have well-established and well-respected public interest organizations that litigate cases on behalf of prisoners. New York has the Legal Aid Society, Prisoners' Rights Project and Prisoners' Legal Services, and Washington, DC has the DC Prisoners' Legal Services Project, the Public Defender Service's Prisoners' Rights Program, and the ACLU National Prison Project.

261. *See Colon*, 215 F.3d at 232 (referencing remands for factual development in other cases and advising district courts to make particularized findings (citing *Welch*, 196 F.3d at 393-95; Brooks v. DiFasi, 112 F.3d 46, 48-49 (2d Cir. 1997); Miller v. Selsky, 111 F.3d 7, 9-10 (2d Cir. 1997))).

It may be that implementing a more difficult process for determining whether there is a liberty interest will have the effect of encouraging courts to skip this first step question, and answer the potentially easier second step question of what process is due. In *Williams v. Fountain*,[262] plaintiff Jeffery Williams challenged a disciplinary proceeding in which he was sentenced to twelve months of disciplinary confinement for assaulting another inmate with a pool cue.[263] The court assumed that Williams' punishment, "especially the full year of solitary confinement," satisfied the "atypical and significant" hardship test without conducting more of a factual or legal analysis.[264] It then considered Williams' assertion that his due process rights had been violated "by the prison officials' failure to evaluate the credibility of confidential informants . . . [and] to establish any record evidence in support of his conviction."[265] The disciplinary committee had relied on an investigation report without hearing testimony from the investigating officer or the confidential witnesses.[266] Although the disciplinary proceedings did not "document some good faith investigation and findings as to the credibility of confidential informants and the reliability of the information provided by them,"[267] the court held that Williams' own statement provided a sufficient independent basis for meeting the due process standard that a disciplinary conviction be "supported by some evidence in the record."[268] Perhaps assuming a liberty interest in every case and then proceeding to a *Mathews v. Eldridge*[269] analysis of what process is due would be a more efficient means of deciding prisoners' due process cases, but a full analysis of this possibility is beyond the scope of this Article.

As evaluated along the second continuum, my proposal would

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262. 77 F.3d 372 (11th Cir. 1996).

263. *See id.* at 373-74. Williams was also sentenced to 45 days of store restriction and incentive privilege restriction. *Id.* at 374. He filed an administrative appeal, and appeals to the prison warden and deputy commissioner of the Georgia Department of Corrections, which were denied, and then filed suit in federal court. *Id.*

264. *See id.* at 374 n.3.

265. *Id.* at 374.

266. *See id.* at 373-74. The hearings investigator based his report on "the charging staff's statements, confidential witness statements, and Williams' own admission that he had participated in a fight with the other inmate (though Williams denied that a pool cue was involved)." *Id.*

267. *Id.* at 375 (citing Kyle v. Hanberry, 677 F.2d 1386, 1390-91 (11th Cir. 1982)); *see also id.* at 375 n.4 (collecting pre-*Sandin* cases requiring that confidential informants' credibility be evaluated).

268. *Id.* at 375 (quoting Superintendent, Mass. Corr. Inst. v. Hill, 472 U.S. 445, 454 (1985)). Williams's statement was that: "There was no pool stick involved, but we did have a fight." *Id.* at 375. The specific charge against him was "physical encounter causing or intending to cause serious physical injury," and Williams did not dispute that the other inmate suffered such injury, nor that the physical encounter between him and the other inmate caused the injury. *See id.* at 376.

269. 424 U.S. 319 (1976).

receive relatively high scores for consistency, at least within a statewide context. A fact-based analysis helps to ensure that the typicality standard does not devolve into an ad hoc, subjective assessment of what is within the realm of acceptable behaviors and outcomes. The variances in outcomes as courts have attempted to apply *Sandin* without a uniform practice of relying on empirical evidence is telling. The fact that one court determined that placement in administrative segregation for less than a year potentially satisfies *Sandin* while another court found that a placement in administrative segregation for over two years does not attests to the malleability of the *Sandin* standard when it is not predicated on empirical evidence.[270] Even within the same circuit, courts have applied *Sandin* in similar circumstances, but reached different results.[271] Additionally, mandating consideration of state positive law will contribute to uniformity of results. That individual courts would be balancing several factors may work against consistency, but this effect would likely be counterbalanced by the requirement that their judgments be anchored in empirical evidence and state law which are relatively objective criteria.

With respect to integrity, this proposal would garner a higher score than any of the four approaches discussed in Part III. It would entail using a variety of analytical tools (typicality, significance, and state positive law) to come to a principled decision about liberty interest creation. Moreover, the method for using these tools is sufficiently circumscribed to promote coherence as courts analyze typicality as measured by empirical evidence and state law as an interpretive, rather than definitional, factor. Balancing typicality and state law with significance, as opposed to establishing three successive hurdles, allows the fullest consideration of all potentially relevant factors.

An additional benefit is that this approach would promote the development of a nationwide standard. In *Wagner v. Hanks*,[272] Judge Posner explained the legal framework supporting a nationwide due process standard in the prisoners' rights context. He focused on the

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270. *Compare* Hatch v. District of Columbia, 184 F.3d 846, 858 (D.C. Cir. 1999) (remanding challenge to 29-week placement in administrative segregation for determination of whether such placement posed an atypical and significant hardship), *with* Jones v. Baker, 155 F.3d 810 (6th Cir. 1998) (holding that two and one-half years of administrative segregation did not constitute an atypical and significant hardship).

271. *Compare* Burnsworth v. Gunderson, 179 F.3d 771 (9th Cir. 1999) (holding that a disciplinary conviction that was unsupported by evidence violated due process even though the consequences of the conviction did not give rise to a liberty interest), *with* Strong v. Ford, No. 95-16404, 1997 WL 120757 (9th Cir. Mar. 17, 1997) (asserting that a disciplinary conviction based on manufactured evidence would not violate due process or implicate a liberty interest because the consequences of the conviction were not sufficiently atypical).

272. 128 F.3d 1173 (7th Cir. 1997) (Posner, J.). Plaintiff Thomas Wagner alleged that he had been sentenced to a year in disciplinary segregation in violation of due process. *Id.* at 1174.

question of a comparative baseline, pointing to *Meachum* and other Supreme Court cases holding that the transfer of prisoners from one prison to another does not give rise to a liberty interest.[273] Based on a review of these cases, he concluded that the most restrictive prison in the state constitutes the standard for evaluating what is "atypical and significant."[274] Without deciding the question, Judge Posner also queried whether "[t]he logic of *Sandin* implies that the conditions of Wagner's disciplinary segregation are atypical only if no prison in the United States to which he might be transferred for nondisciplinary reasons is more restrictive."[275] At least two Justices agree that logic and precedent require a nationwide standard of what is protected under the Due Process Clause of the Constitution.[276]

Although a focus on state practices and state law appears contrary to the development of a nationwide standard, it is necessary if such a

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273. *See id.* at 1175-76 (citing Olim v. Wakinekona, 461 U.S. 238 (1983); Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976)); *cf.* Bryan v. Duckworth, 88 F.3d 431, 433-35 (7th Cir. 1996) (discussing, but not deciding whether the comparative baseline should be general population in the prison at issue, or "ordinary conditions" in the state's most secure prison).

274. *See Wagner*, 128 F.3d at 1175 (citing Griffin v. Vaughn, 112 F.3d 703, 708-09 (3d Cir. 1997)). The *Wagner* court additionally articulated a slippery slope argument, asserting that if transfers were held to give rise to liberty interests, then courts would have "to adjudicate transfers within a prison—to determine, for example, whether the petitioner had been deprived of liberty by being transferred from a large cell to a small one," and "[f]ederal judges would have been plunged deep into the minutiae of prison administration, much as if they were managing a hotel chain." *Id.* at 1175.

275. *Id.* at 1176. The issue of whether the comparative baseline should be based on nationwide standards was deemed factually irrelevant since the state in which Wagner was incarcerated, Indiana, had prisons with conditions that were likely to be among the most restrictive in the country. *See id.* at 1176-77. The decision did not cite to any evidence to support this assertion regarding Indiana prisons.

One factor that Judge Posner did not consider was the likelihood that an intra- or inter-state transfer would actually occur. For example, although a prisoner may in theory be transferred to an out-of-state prison without first receiving procedural due process, if such a transfer had never previously occurred, then this fact about typicality might impact a liberty interest analysis. Similarly, if state law satisfied the *Hewitt* requirements of mandatory language, substantive predicates, and cabined discretion, and the particular prisoner singled out for transfer would suffer a significant deprivation based on unusual medical needs, then a liberty interest may arise.

276. *See* Sandin v. Conner, 515 U.S. 472, 489 (1995) (Ginsburg, J., dissenting) (criticizing anomalous result that constitutional liberty interests described as fundamental and unalienable might differ from state to state).

There is a potential counter-argument that states should not be bound by a nationwide due process standard, but instead should have the autonomy to decide for themselves what level of protection they want to provide. For example, a relatively poor state with a small tax base could assert that it prefers to allocate resources to hiring more public school teachers, as opposed to more hearing officers for prisoners challenging their sex offender classification. One potential response would be that the requirements of procedural due process are flexible and would not necessarily mandate hiring additional staff or conducting a formal hearing. Instead, it could entail ensuring that a certain procedure is followed in the first instance, or that the warden review the paperwork supporting a particular decision.

standard is to be based on actual practices as opposed to subjective value judgments. It simply is not feasible for individual prisoner plaintiffs, or state defendants for that matter, to conduct discovery on a nationwide scale.[277] Over time, as courts cited to statewide empirical information in their decisions, as well as information describing, for example, the conditions of confinement in various types of housing, the restrictions on those classified as sex offenders, and the procedures for disciplinary hearings, it would be possible to develop a database of such information.[278] Additionally, once each state has developed a system for such data collection, coordination among the various states' departments of corrections, or perhaps use of freedom of information laws could facilitate the compilation of nationwide statistical information.[279]

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277. In theory, a nationwide class action lawsuit could provide a vehicle for the necessary discovery, but as a practical matter because there is no financial incentive for such litigation on behalf of prisoners asserting their due process rights, as compared to plaintiffs in a mass tort case, for example, it is unlikely to occur.

278. Considering the impact that the court's decision in *Shoats v. Horn*, 213 F.3d 140 (3d Cir. 2000), could have on circuits that tend not to find liberty interests in administrative segregation placements demonstrates the potential benefit of promoting a nationwide standard.

Plaintiff Russell Shoats challenged his incarceration in administrative custody, the equivalent of solitary confinement, for eight years. *See id.* at 141-42, 144. The court easily found that the deprivation was atypical and significant, by applying two factors explicitly analyzed in *Sandin*, 1) the amount of time the prisoner was placed into disciplinary segregation; and 2) whether the conditions of his confinement in disciplinary segregation were significantly more restrictive than those imposed upon other inmates in solitary confinement." *Id.* at 144 (citing *Sandin*, 515 U.S. at 486). With respect to the first, defendants conceded "that the amount of time Shoats has already spent in administrative confinement is not only atypical, but is indeed 'unique.'" *Id.* With respect to the second, the court relied on testimony from the plaintiff and the Special Assistant to the Department of Corrections ("DOC") Commissioner, Thomas James, to support its conclusion that Shoat's "long-term confinement has imposed a significant hardship on him in relation to the ordinary incidents of prison life." *Id.* The court described his conditions as follows:

> [The plaintiff] has been confined in virtual isolation for almost eight years. He is confined in his cell for 23 hours a day, five days a week, and 24 hours a day, two days a week. He eats meals by himself. His sole contact is with DOC officials, and has been denied contact with his family for almost eight years. He is prohibited from participating in any educational, vocational, or other organizational activities. He is prohibited from visiting the library. James concedes that he has never witnessed one example of such permanent solitary confinement in his 22 years with the DOC. Moreover, James explained that he would be concerned about the psychological damage to an inmate after only 90 days of such confinement and would generally recommend transfer to the general population after 90 days as a consequence.

Id. (citations to the record omitted).

Although the circuits that take a narrow approach have either adopted or are on the path to adopting a bright-line rule that precludes placement in administrative segregation from engendering a liberty interest, *Shoats* illustrates that under certain circumstances, placement in administrative segregation does in fact generate a liberty interest.

279. The goal of a nationwide standard regarding, for example, placement in

The need for the development of a nationwide standard is illustrated by *Beverati v. Smith*.[280] In *Beverati*, two plaintiffs challenged their placement in administrative segregation for six months following a disciplinary hearing during which neither was sentenced to disciplinary segregation.[281] In determining whether the plaintiffs had a state-created liberty interest,[282] the *Beverati* court correctly stated that *Sandin* required it to "compare the conditions to which [plaintiffs] were exposed in administrative segregation with those they could expect to experience as an ordinary incident of prison life,"[283] but it never delineated the parameters of ordinary prison life. Relying on prison regulations governing administrative segregation, the court concluded that conditions in administrative segregation and general population were similar, and that the differences that existed were not particularly significant.[284]

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administrative segregation would not be to establish a bright-line rule for every state, such as: any detention of *X* or more days in administrative segregation warrants procedural due process protection. Although such a rule could be established within a state, *see, e.g.*, Colon v. Howard, 215 F.3d 227, 232 (2d Cir. 2000) (Judge Newman proposed a bright-line rule that confinement in the Segregated Housing Unit for more than 180 days satisfies *Sandin*'s atypical and significant test), differences in the actual conditions and state law governing administrative segregation from state to state warrant different typicality cut-off points. For example, if conditions in administrative segregation in Virginia happen to be far more restrictive and onerous than a similarly labeled placement in Vermont, then procedural due process protections may be required for shorter administrative segregation sentences in Virginia than in Vermont. The goal of a nationwide standard would be to have the various states' standards converge into as narrow a range as possible.

280. 120 F.3d 500 (4th Cir. 1997).

281. *Id.* at 501-02. One plaintiff was found guilty of possession of escape contraband and sentenced to 30 days of restricted activity, and the other was found not guilty. *Id.* During a time that the prison was undergoing reconstruction, a cell search of the plaintiffs' cell uncovered "escape paraphernalia," including denim fabric, "some of which had been fashioned into vests and modified jeans," and "two packages of inmate movement passes." *Id.* at 501. This search was the second within two months in which such materials were found in plaintiffs' cell. *Id.* Defendants' rationale for the administrative segregation placement was that they "constituted an escape risk and a danger to the security of the institution, staff, and other inmates." *Id.* at 502.

282. The court concluded that confinement in administrative segregation logically could not "exceed[] the sentence imposed in such an extreme way as to give rise to the protection of the Due Process Clause by its own force." *Id.* at 502.

283. *Id.* at 503 (citing Sandin v. Conner, 515 U.S. 472, 485-86 (1995)).

284. *See id.* The court cited no facts in support of this conclusion; it did not outline the parameters of living conditions in general population, and it did not then compare these conditions to the conditions in administrative segregation. Instead, the court cited to case law from other circuits which had concluded that "confinement to administrative segregation did not implicate a liberty interest." *Id.* at 503-04 (citing Talley v. Hesse, 91 F.3d 1411, 1413 (10th Cir. 1996); Crowder v. True, 74 F.3d 812, 814-15 (7th Cir. 1996) (per curiam); Luken v. Scott, 71 F.3d 192, 193 (5th Cir. 1995) (per curiam); Rimmer-Bey v. Brown, 62 F.3d 789, 790-91 (6th Cir. 1995)).

The *Beverati* court purported to consider the plaintiffs' affidavits which alleged that the actual conditions in administrative segregation were more onerous than depicted in the regulations:

> They claim that when they were initially placed in segregation, their cells were infested with vermin; were smeared with human feces and urine; and were flooded with water from a leak in the toilet on the floor above. And, they assert, they were forced to use their clothing and shampoo to clean the cells. In addition, [the plaintiffs] maintain that their cells were unbearably hot . . . that those assigned to administrative segregation did not receive clean clothing, linen, or bedding as often as required by the regulations . . . ; that they were permitted to leave their cells three to four times per week, rather than seven, and that no outside recreation was permitted.[285]

Accepting these allegations as true, the court nevertheless concluded that although conditions were more burdensome than in the general prison population, "they were not so atypical that exposure to them for six months imposed a significant hardship in relation to the ordinary incidents of prison life."[286] On its face, the court's pronouncement indicates that prisoners in Maryland typically encounter vermin-infested, feces-smeared, toilet-flooded cells which are "unbearably hot." Whatever the variation in terms of actual practices and state positive law from state to state, it seems clear that the conditions accepted as typical in *Beverati* would fall below the range of typical prison conditions throughout the nation. A nationwide standard for typicality would give plaintiffs in outlier states with practices that fall below this range a basis for due process claims. It would also have the effect of encouraging conformity with national standards for determining what deprivations give rise to a liberty interest and when procedural due process protection is warranted.

CONCLUSION

This Article began with a question: Does the scope of a prisoner's constitutional right to due process vary from state to state? The answer to this question is yes. Under the jurisprudence of state-created liberty interests, a state's actual practices and positive law should shape the level of procedural due process protection afforded within that jurisdiction. The open question is whether there is a limit to the degree of variation the law should tolerate. Focusing on state practices and law will inevitably lead to a range of due process protection, with individual states arrayed from the top to the bottom

285. *Id.* at 504.

286. *Id.* Although the court may have discounted the plaintiffs' allegations based on its experience with other prisoner cases, it had asserted that it accepted these allegations as true.

of that range. A wide range would reflect the fact that there is no national consensus, and in that case each state could have an individual standard for liberty interest creation and procedural due process protection. If, however, the state standards have converged and the range is narrow, then a state that falls significantly below that range could be held to a national standard.

My proposal is predicated on accepting typicality and significance as governing principles in liberty interest analysis. Based on an examination of how the various circuits have applied *Sandin* and an evaluation of their approaches, I conclude that the scope of state-created liberty interests should be determined by balancing typicality as measured by empirical evidence of actual state practices, significance, and state positive law. Employing this balancing test would lead to consistent results and represents a principled method of due process analysis. My proposal could also assist in the process of developing a nationwide standard for procedural due process protection.